LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
JAN 19 1971
E. ROBERT SEAVER, CLERK

SUPREME COURT OF THE UNITED STATES

October term, 1970

No. 1251

SOUTHLAND INCORPORATED
Petitioner in Certiorari

v.

COX ENTERPRISES INC AND ATLANTA NEWSPAPERS INC.
Defendants in Certiorari

APPENDIX

Petition of Southland Incorporated for writ of certiorari to the Supreme Court of Georgia

G. Seals Aiken
Attorney for Petitioner
Suite 1409-10 Candler Building
Atlanta, Georgia 30303

INDEX

Page

Appeal Extension of Time----------37, 38
Certificate of Urgency of Trial Court----------40
Complaint----------2
Cox Enterprises Appeal Decision----------5
Decision Affirming Trial Court----------5
Decision Dismissing Southland's Appeal in 25917--5
Decision Dismissing Southland's Main Appeal------5
Decision Dismissing Southland's Original Appeal--5
Decision in Appeal of Cox Enterprises----------5
Decision in Original Appeal----------5
Decision in Southland's Appeal----------5
Decision Reversing Trial Court----------5
Denial of Rehearing in 25917----------21
Denial of Rehearing in 26026----------31
Denial of Rehearing in Main Appeal----------21
Denial of Rehearing in Original Appeal----------21
Extensions of Time to Prepare Appeal---------37, 38
Georgia Supreme Court Decision 25917----------5
Georgia Supreme Court Decision 26026----------5
Georgia Supreme Court Decision in Main Appeal----5
Georgia Supreme Court Decision in Original Appeals
Georgia Supreme Court Decision in Secondary
Appeal----------5
Georgia Supreme Court Denies Rehearing in
Main Appeal----------21
Main Appeal Decision----------5
Main Appeal Rehearing Sought----------9
Motion of Petitioner to Dismiss Defendants'
Motion to Dismiss Appeal in Trial Court--------39
Motion of Southland for Rehearing in 25917--------9
Motion of Southland for Rehearing in Main Appeal-9
Motion of Southland for Rehearing in Original
Appeal----------9
Motion of Southland for Rehearing in 26026------22
Motion of Southland for Rehearing in Secondary
Appeal----------22
Motion to Dismiss Appeal in Trial Court Order---39
Order Denying Injunction as to Atlanta
Newspapers, Inc.----------35
Order Denying Injunction as to Batson-Cook Co.---35
Order Denying Injunction as to City of Atlanta---35

Order Denying Injunction as to Cox Enterprises---34
Order for Supplemental Transcript----------42
Order of Trial Court Denying Dismissal of Defendants' Motion to Dismiss Appeal----------40
Order of Trial Court Dismissing Petitioner's Motion to Dismiss Defendants' Motion to Dismiss Appeal----------40
Order setting up Hearing on Defendants' Motion to Dismiss Appeal in Trial Court--------39
Order setting up Original Hearing----------5
Original Appeal Decision----------5
Original Appeal Rehearing Sought----------9
Original Complaint----------2
Petitioner's Comment on Decisions----------9
Petitioner's Motion for Rehearing in 25917--------9
Petitioner's Motion for Rehearing in Main Appeal----------9
Petitioner's Motion for Rehearing in Original Appeal----------9
Petitioner's Motion for Rehearing in Secondary Appeal----------22
Petitioner's Motion for Rehearing in 26026-------22
Petitioner's Motion to Dismiss Defendants' Motion to Dismiss Appeal in Trial Court--------39
Rehearing in 26026 Denied----------32
Southland Denied Rehearing in 26026----------32
Petitioner Denied Rehearing in Secondary Appeal----------32
Rehearing Denied in 25917----------21
Rehearing Denied in Main Appeal----------21
Rehearing Denied in Original Appeal----------21
Rehearing Sought by Petitioner in 25917----------9
Rehearing Sought by Petitioner in Main Appeal----9
Rehearing Sought by Petitioner in Original Appeal----------9
Rehearing Sought by Petitioner in 26026---------22
Rehearing Sought by Petitioner in Secondary Appeal----------22
Remittitur Motion----------32
Remittitur Motion Main Appeal and Secondary Appeal----------32
Remitturs Stay----------33
Reversal of Trial Court----------5

Secondary Appeal Decision----------5
Secondary Appeal Rehearing Denied----------32
Secondary Appeal Rehearing Sought----------22
Show Cause Order for Permanent Injunction----------5
Southland Denied Rehearing in Secondary Appeal--32
Southland's Motion for Rehearing in 25917----------9
Southland's Motion for Rehearing in 25926----------22
Southland's Motion for Rehearing in Main Appeal--9
Southland's Motion for Rehearing in Original Appeal----------9
Southland's Motion for Rehearing in Secondary Appeal----------22
Stay of Remittur----------33
Supplemental Transcript Order----------42
Supreme Court of Georgia Decision 25917----------5
Supreme Court of Georgia Decision 25926----------5
Supreme Court of Georgia Decision in Main Appeal----------5
Supreme Court of Georgia Decision in Original Appeal----------5
Supreme Court of Georgia Decision in Secondary Appeal----------5
Supreme Court of Georgia Denies Rehearing in 25917----------21
Supreme Court of Georgia Denies Rehearing in Original Appeal----------21
Trial Court's Certificate of Urgency----------41
Trial Court's First Order----------5
Trial Court Motion to Dismiss Appeal Order----------39
Trial Court's Order Denying Dismissal of Motion to Dismiss Appeal----------40
Trial Court's Order Denying Injunction as to Atlanta Newspapers Inc.----------35
Trial Court's Order Denying Injunction as to Batson-Cook Co.----------36
Trial Court's Order Denying Injunction as to City of Atlanta----------36
Trial Court's Order Denying Injunction as to Cox Enterprises----------34
Trial Court's Order Dismissing Petitioner's Motion to Dismiss Defendants' Motion to Dismiss Appeal----------40

CASES CITED

Page

Albany Fed Sygs & Loan Assn v Henderson
31 SE 2d 20; 198 Ga 116----------18
Allison v Cobb County 98 Ga App 231; 103
SE 2d 196----------17
Brandon Manget & Co v Blake & Madden 68 SE
837; 135 Ga 71----------13
Bullard v Southern Ry Co 34 SE 1002; 110 Ga
304----------12
Central of Ga Ry Co v Hartley 103 SE 262; 25
Ga App 120----------14
Cherry v Brown 192 P 227----------27
CJS Vol 65 Sec 90----------26
Dixon v Minnesota Lumber Co 64 SE 71; 132 Ga
347----------13
Dowling v Tracy 116 Ga App 43; 156 SE 2d 524----17
Fahrig v Garrett 224 Ga 817; 165 SE2d 126--------24
Ferber v Leise 151 NW 307; 97 Neb 795----------27
Ga Terminal Co v Temple Bapt Ch 87 SE 1023;
144 Ga 791----------12
Georgia's Bill of Rights Code 2-105----------29
Gibbon v Lewis 137 Ga 22; 72 SE 412----------12
Gray v Gray 34 Ga 488----------11
Griffin v Hardware Mut Ins Co 91 SE 2d 10;
212 Ga 130----------13
Hall v Mayor and Council of Calhoun 79 SE
533; 140 Ga 611----------13
Harris v First Nat Bk 282 P 1097; 140 Okla 280--27
Hunnicutt v Groves 72 SE 526; 10 Ga App 12-------14
Indianapolis Life Ins Co v Lundquist 52 NE
2d 338; 222 Ind 350----------26
Keaton v Forbes 70 SE 1110; 135 Ga 188----------13

McIntyre v City of Vidalia 185 SE 318;----------13
Moody and Wife v Davis 10 Ga 410----------15
Morton v Beavers 80 SE 716; 141 Ga 210----------12
Mulling v State 80 SE 575; 140 Ga 36----------12
Peppers v Travelers' Ins Co 173 SE 177; 48
Ga App 886----------14
Preston v Walker 36 SE 723; 112 Ga 421----------12
Revere v Chandler 77 SE 818; 139 Ga 800----------12
Reynolds v Nimmons 96 Vt 222; 118 A 810----------29
Robinson v Burns 42 Ga 614----------14
Rogers v McDonald 226 Ga 329----------8-24
Seaboard Air Line Ry Co v Brooks 107 SE
878; 151 Ga 625----------13
Southern Express Co v J Palmer & Co 48 Ga 85----13
Southern Ry Co v Hubbs 121 Ga 428; 49 SE 294----17
Stanley v Stanley 35 SE 2d 366; 196 Ga 192----------14
State ex rel Benton v Elder 31 Neb 185; 47
NW 710; 10 LRA 756----------29
Steele v Central of Ga Ry Co 123 Ga 237 51
SE 430----------17
Taylor v Bank of Tifton 78 SE 335; 140 Ga 45----12
J N Taylor Trust v Briggs 142 Pac 183 Okla 306--27
Terrell v State 114 SE 910; 29 Ga App 286----------14
Town of Grantville v Fidelity Deposit Co 77
SE 627; 139 Ga 496----------13
Tripp v Evans 69 SE 551; 141 Ga 120----------12
W & A RR Co v Maynard 81 SE 666; 141 Ga 590----13
Wallace v Matthewson 84 SE 488; 143 Ga 237----14
Wise v Ray 112 SE 905; 28 Ga App 661----------14
Wright v Lake 76 Ga 219----------13
Zoebel v Caldwell 72 Neb 47; 99 NW 843;
102 NW 80----------28

SUPREME COURT OF THE UNITED STATES

October term, 1970

NO. 1251

SOUTHLAND INCORPORATED
Petitioner in Certiorari

v.

COX ENTERPRISES INC AND ATLANTA NEWSPAPERS INC.
Defendants in Certiorari

A P P E N D I X

Petition of Southland Incorporated for writ of certiorari to the Supreme Court of Georgia

IN THE SUPERIOR COURT OF THE

COUNTY OF FULTON

STATE OF GEORGIA

SOUTHLAND, INCORPORATED VS. COX ENTERPRISES, INC., DOING BUSINESS AS ATLANTA NEWSPAPERS, INC., BATSON-COOK COMPANY, AND CITY OF ATLANTA	CIVIL ACTION FILE NO. B-44470 COMPLAINT

1. The defendants herein are Cox Enterprises, Inc., doing business as Atlanta Newspapers, Inc., Batson-Cook Company, and City of Atlanta.

2. Cox Enterprises is a corporation organized in the State of Delaware with a principal office and place of business at 10 Forsyth Street, N.W., in the City of Atlanta and County of Fulton, Georgia, where service of legal process can be perfected upon it, and it is subject to the jurisdiction of this court in this case.

3. Atlanta Newspapers, Inc. is a corporation organized under the laws of Georgia, with principal office and place of business at 10 Forsyth Street, N.W., in the City of Atlanta and County of Fulton, Georgia, where service of legal process can be perfected upon it, and it is subject to the jurisdiction of this court in this case.

4. Batson-Cook Company is a corporation organized under the laws of Georgia, with an office place of business at 15 Peachtree St., N.E., in the City of Atlanta and County of Fulton, Georgia, where service of legal process can be perfected upon it, and it is subject to the jurisdiction of this court in this case.

5. City of Atlanta is a municipal corporation with principal office in the City Hall at 168 Mitchell St. S.W., in the City of Atlanta and County of

Fulton, Georgia, where service of legal process can be perfected upon it, and it is subject to the jurisdiction of this court in this case.

6. The defendants herein have conspired to take over and convert to their own private use one-half of Fairlie Street, N.W. for a distance of one block from Marietta Street to the Railroad tracks, and one-half of Wall Street, N.W., for a distance of two blocks from Fairlie Street to Bartow Street in the City of Atlanta and County of Fulton, Georgia, and pursuant to said conspiracy have poured concrete foundations for a permanent multiple-story building for the purpose of conducting a newspaper business under the names of Atlanta Journal and Atlanta Constitution in said obstructed streets.

7. The said obstruction by the defendants in said streets has forced all traffic thereon into a narrow single lane, causing a heavy congestion of traffic on said streets and adjoining streets and prevents much traffic from using said obstructed streets.

8. The plaintiff occupies the building on the lower level of Forsyth Street and known as 11½ Forsyth Street, N.W., according to the present numbering of streets in the City of Atlanta, and its means of ingress and egress is over said streets illegally obstructed by the defendants.

9. Plaintiff conducts a warehouse, car-storage and printing business on lower level of said Forsyth Street at No. 11½ and has been severely, specially, and irreparably damaged by the defendants' obstructing its ingress and egress on said streets in its said business.

10. Plaintiff shows that the said obstruction of said streets constitutes a public and private nuisance.

11. Plaintiff shows that it will be severely, specially, and irreparably damaged in its business in the manner and particulars briefly stated herein as long as said obstruction of said streets continues.

12. Plaintiff shows that it has no adequate

remedy at law.

WHEREFORE, PLAINTIFF prays as follows:

(a) That defendents be temporarily restrained and enjoined from continuing the said obstruction of said streets and that upon a hearing the defendants be permanently enjoined and restrained from continuing the same.

(b) That process issue and be served upon the defendants together with a Rule Nisi requiring them to show cause at a time and place fixed by the court why they should not be permanently restrained and enjoined from continuing said obstruction of said streets.

F. L. Breen,
Attorney for Plaintiff,
325 Atlanta Natl. Bank Bldg.,
Atlanta, Ga. 30303

GEORGIA, FULTON COUNTY:

Personally appeared Boyd E. Taylor before the undersigned attesting officer, who, after being duly sworn, deposes and says that he is the president of Southland Incorporated; that he is authorized to make this affidavit; and that the foregoing complaint is true and correct.

Boyd E. Taylor

sworn to and subscribed before me
On this the 18th day of March, 1969

(G. Seals Aiken)

G. Seals Aiken
NOTARY PUBLIC, FULTON COUNTY, GEORGIA

ORDER

The foregoing complaint has been read and considered and directed to be filed together with this order. The defendants are hereby directed to show cause before this court on the 28 day of March, 1969, at 11 AM o'clock why they should not be permanently restrained and enjoined as prayed. It is further directed that the foregoing complaint and process together with this order be served upon the defendants.

This 18 day of March, 1969.

Sam Phillips McKenzie
Presiding JUDGE, FULTON SUPERIOR COURT.

263 324

Decided: OCT. 8, 1970

In the Supreme Court of Georgia

25917 SOUTHLAND, INCORPORATED, V. COX ENTERPRISES, INC., Et Al.

GRICE, Justice. This case is controlled by Cox Enterprises, Inc., Et Al. v. Southland, Incorporated, 226 Ga. , (SE2d) (Case No. 26026) this day decided.

Appeal dismissed.
All the Justices concur.

264 319

Decided: OCT. 8, 1970

In the Supreme Court of Georgia

26026 COX ENTERPRISES, INC., Et Al. v. SOUTHLAND, INCORPORATED

The trial court should have dismissed the appeal in Southland, Incorporated, v. Cox Enterprises, Inc., Et Al., 226 Ga. , (SE2d) (Case No. 25917) because of the unreasonable delay in filing of the transcript of evidence and proceedings.

GRICE, Justice. For decision here is whether an appeal should have been dismissed upon the ground of unreasonable and inexcusable delay in the filing of the transcript of evidence and proceedings.

This issue arose after the grant of summary judgments for the defendants in an action filed in

the Superior Court of Fulton County by Southland, Inc., against Cox Enterprises, Inc., the City of Atlanta, and Batson-Cook Co., seeking injunctive relief against continuance of an alleged obstruction of two streets by construction of a multi-story building. Atlanta Newspapers, Inc., was later named as a defendant.

Upon grant of the summary judgments, the plaintiff on May 1, 1969, filed a notice of appeal.

On May 8, 1970, before the appeal had been docketed in this court, two of the defendants filed in the trial court their motion to dismiss the appeal. The motion was based upon section 2 of the Appellate Practice Act (Ga. L. 1965, pp. 18, 29, as amended; Code Ann. (6-809(b)) and asserted that there was an unreasonable and inexcusable delay in the filing of the transcript and that the delay was caused by the plaintiff. The motion alleged that 13 months had elapsed between the judgments of the trial court and the filing of the transcript on May 7, 1970, and that during that time the defendants had expended large sums of money in constructing the building.

The trial court on May 20, 1970, after the appeal had been docketed in this court on May 12, 1970, (Case No. 25917), entered an order on the motion to dismiss, in which it found that "the delay in filing the transcript in this case was unreasonable and inexcusable and that this delay was caused by the . . . (plaintiff's) failure to decide to order the transcript as a whole until the fall of 1969."

This order further recited: "This court, however, recognizes the danger inherent in any statute which permits a trial court to dismiss an appeal of its own rulings. In view of this and the fact that movants failed to object to the order of extensions previously granted as well as the fact that said case has now been docketed in the Supreme Court and assigned for argument, this court denies the motion to dismiss the appeal.

"However, it is ordered that a transcript be made of this proceeding and this supplemental

transcript be forwarded to the Supreme Court of Georgia as a part of the record in this case for determination as to whether or not the appeal should be dismissed."

This appeal is from that judgment, which was certified for immediate review.

1. The evidence adduced before the trial court on the motions to dismiss the appeal, while in conflict, amply supported such finding of delay caused by the plaintiff.

The court reporter testified that it was not until August or September, 1969, that the plaintiff, or anyone on its behalf, ordered any kind of transcript; that in August or September of 1969, the plaintiff's president requested that the reporter type the objections to the evidence, and they were delivered to him in early October; that it was not until November 10, 1969, that the plaintiff's president ordered a transcript of all of the evidence and proceedings; and on December 11, 1969, such transcript was delivered to plaintiff's attorney; and that in late April or early May 1970, the plaintiff's president requested the reporter to obtain the original documentary evidence, and it was delivered to him that same day.

The project manager of the defendant contractor testified that between the date of the original hearing in the case and the hearing on the motion to dismiss, 75% of the construction had been completed, leaving only the finish items.

The vice-president of the defendant Atlanta Newspapers, Inc., testified as to the large financial outlay for the building during each of the 12 months that had ensued since filing of the notice of appeal.

2. The trial court having found that the delay in filing the transcript was unreasonable, inexcusable and caused by the plaintiff and such finding being supported by the evidence upon the hearing, it should have dismissed the appeal.

Since that court did not enter a dismissal, this court will do so.

As we appraise the salient factors, the lapse

of time from the notice of appeal on May 1, 1969, to the filing of the transcript on May 7, 1970, under the circumstances referred to above, constitutes a stale appeal.

Although a 1968 amendment (Ga. L. 1968, pp. 1072; Code Ann. (6-809(b)) to the Appellate Practice Act provides that the trial courts, rather than the appellate courts, may dismiss appeals for failure of a party to file the transcript within the proper time, this court has held that such amendment does not change the responsibility of this court under the Constitution (Art. VI, Sec. II, Par. V; Code Ann. (2-3705), and that this court will dismiss a stale appeal. See in this connection, Fahrig v. Garrett, 224 Ga. 817 (165 SE2d 126).

(a) Furthermore, under the circumstances shown here dismissal cannot be avoided because of the successive extensions which the plaintiff obtained from judges of the trial court.

There is nothing in our statutes or decisions which requires that the obtaining of extensions per se excuses an appellant from the consequences of his own unreasonable delay.

This court in Rogers v. McDonald, 226 Ga. 329 (SE2d) recognized that the obtaining of extensions is not conclusive on the issue of delay by the appellant in filing the transcript. In that case several successive extensions had been granted and the appellee sought to have the trial court set aside the extensions as an abuse of judicial discretion under the facts appearing there. The trial court conducted a hearing at which full evidence was presented on the issue as to unreasonable delay and found that under the facts there was no cause to set aside the extensions. This court affirmed, stating that it was not shown that the appellant was in any way responsible for the length of time being taken by the reporter to prepare the transcript.

(b) The fact that the defendants did not object to the grant of the extensions does not bar

them from moving to dismiss the appeal.

Each of the extensions presented to the trial judge for his approval recited that an additional number of days "will be required in which to prepare the record on appeal . . ."

There is nothing which shows that the defendants knew that notwithstanding the plaintiff's claim that additional time was required, any such need was due to his own delay in ordering the transcript. Under the Appellate Practice Act (ga. L. 1965, pp. 18, 21, as amended; Code Ann. (6-804) the grant of such extensions may be ex parte.

For the foregoing reasons the judgment in the instant case is

Reversed.
All the Justices concur.

PETITIONER'S NOTE: Examination of the two companion decisions in this case shows that the Georgia Supreme Court dismissed the main appeal with four lines and devoted 161 lines to the secondary appeal, then decided that the secondary appeal, filed three months after the main appeal, "controlled."

IN THE SUPREME COURT OF GEORGIA

SOUTHLAND, INCORPORATED,)
APPELLANT)
VS.) CASE NO. 25917
COX ENTERPRISES, INC.,)
DOING BUSINESS AS ATLANTA)
NEWSPAPERS, INC., ET AL,)
APPELLEES)

MOTION OF SOUTHLAND, INCORPORATED TO THE SUPREME COURT OF GEORGIA FOR A REHEARING.

Now comes Southland, Incorporated, Appellant in the above stated case, during the term in which judgment was rendered for Defendants Cox Enterprises, Inc., doing business as Atlanta Newspapers, Inc., et al, and within the time provided by law, and makes this its motion for a rehearing. It will be referred to in this motion

as Plaintiff and Cox Enterprises, Inc. et al as Defendants, the respective positions they occupied in the trial court.

The judgment of this Court complained of was rendered October 8, 1970.

This Court has very obviously overlooked some material facts in the record, some statutes, and some decisions which are controlling as authority and which would require a different judgment from that rendered, and has erroneously construed and misapplied provisions of law and controlling authorities. The said material facts in the record and controlling statutes, decisions, authorities, and provisions of law are specified briefly below.

At the close of the trial in the lower court on April 4, 1969, the Court Reporter misplaced all of the documentary evidence (258 pages of exhibits, including affidavits, charts, photographs, plats, etc.) and did not find it until April 24, 1970, nearly 13 months later, thus delaying the preparation and filing of the transcript of the evidence necessary to be transmitted with Plaintiff's appeal to the Supreme Court. This is the uncontroverted evidence in the record. Despite this uncontradicted evidence, the lower court, and this court in deciding Case No. 26026, stated that the delay was inexcusable and was caused by the Plaintiff. At no time was the Plaintiff in custody or control of the missing evidence, and at no time was care of the evidence the responsibility of the Plaintiff.

The dismissal of Plaintiff's appeal by this Court deprives it of its property without due process of law and without equal protection of the law in violation of Article I, Section I, Paragraphs II, III, and IV of the Georgia Constitution and Section I of Amendment XIV of the U. S. Constitution as applied to the States, by depriving it of its right under the said provisions of the Georgia and U.S. Constitutions to a review of the erroneous judgment of the trial

court granted to other persons in like circumstances and similar situations.

THE UNCONTRADICTED EVIDENCE IS THAT THE PLAINTIFF WAS DILIGENT AT ALL TIMES IN ITS EFFORTS TO HAVE THE TRANSCRIPT COMPLETED AND TRANSMITTED WITH THE APPEAL PROMPTLY TO THIS COURT.

The judgment of this court that, "This case is controlled by Cox Enterprises, Inc. Et al v. Southland, Incorporated, 226 Ga., (Case No. 26026) this day decided," and "Appeal dismissed," is without foundation in fact or law and unsupported by any authority whatever. The so-called controlling case was filed nearly three months after the appeal in this case was docketed. Thus the new case is said to control the older case, although the decisions were handed down the same day. Nowhere have we been able to find an instance in which a later case controls an older case. Nowhere have we been able to find another instance in which the alleged controlling case dealt with matter entirely different from that of the case allegedly controlled.

Case No. 26026 which this court states controls this case, No. 25917, deals with one subject and one subject only, namely, alleged staleness of appeal. The record in this case, No. 25917, presents voluminous evidence of fact, many questions of law, and questions which must be decided in the public interest and in justice to Plaintiff. None of these matters is even touched upon in the so-called controlling case no. 26026.

This Court in 1866 laid down the ground rules for controlling cases. In Gray vs. Gray, 34 Ga. 499, it held: "A decision of this Court WHEN IN POINT, is conclusive authority in SUBSEQUENT CASES." Since that time this Court has consistently held in hundreds of cases the facts or the questions propounded must be the same in the controlling case and the case controlled. The decision of this Court in case no. 25917 does not meet this test.

If the questions presented by the original appeal of Southland, Incorporated, are

not decided by this Court now, they will no doubt be back before this Court in future appeals. Much litigation can be avoided and justice can be served by facing the issues in this appeal and deciding them correctly now.

In 1911 this Court held that former decisions UNDER THE SAME FACTS were controlling. Giddens vs. Lewis, 137 Ga. 22, 72 S.E. 412. The Court of Appeals has consistently followed the same principle as in Central of Ga. Ry. Co. Vs. Hartley, 25 Ga. App. 120, 103 S.E. 262, in which it held that the case controlled NEARLY EVERY PARTICULAR in a suit by another plaintiff growing out of the same transaction.

Back to decisions of this Court we find in 1916 Mulling v. State, 88 S.E. 575, 145 Ga. 36, that the question propounded was SUBSTANTIALLY THE SAME as in the controlling case.

In Morton v. Beavers, 80 S.E. 716, 141 Ga. 219, we find that "this case is IDENTICAL IN ITS FACTS" with the controlling case.

In Georgia Terminal Company v. Temple Baptist Church, 87 S.E. 1023, 144 Ga. 791, we find that the facts relied on are SUBSTANTIALLY THE SAME as in the controlling case.

In Revere v. Chandler, 77 S.E. 818, 139 Ga. 600, we find "this case ON ITS FACTS is controlled by * * *"

In Taylor v. Bank of Tifton, 78 S.E. 335, 140 Ga. 45, this Court said "the FACTS AND THE ASSIGNMENTS OF ERROR ARE THE SAME" as in the controlling case.

In Tripp v. Evans, 80 S.E. 551, 141 Ga. 120, this Court said: "UNDER THE FACTS of this case it is controlled by * * *"

In Bullard v. Southern Railway Co., 34 S.E. 1002, 110 Ga. 304, this Court said: "The FACTS IN THIS CASE clearly bring it within the principle announced in * * *". (The controlling case).

In Preston v. Walker, 36 S.E. 723, 112 Ga. 421, this Court held: "This case, UPON ITS FACTS, falls squarely within the ruling" of the controlling case.

In Town of Grantville v. Fidelity Deposit Company, 77 S.E. 627, 139 Ga. 495, this Court held: "UNDER THE FACTS OF THIS CASE it is controlled by * * *."

In Southern Express Co. v. S. and J. Palmer and Co., 48 Ga. 85, this Court held: "THE FACTS AND PLEADINGS ARE SIMILAR TO THE PRESENT CASE and must control it."

Cases decided by this Court which are offered as being THE SAME IN POINT are Griffin v. Hardware Mutual Insurance Co., 91 S.E. 2nd 10, 212 Ga. 130; Western and Atlantic Railroad Co. v. Maynard, 81 S.E. 866, 141 Ga. 590; and Seaboard Air Line Railway Co. v. Brooks, 107 S.E. 878, 151 Ga. 625.

The original appeal of Southland, Incorporated and the "controlling" case of Cox Enterprises, Inc. are NOT THE SAME IN POINT.

Other decisions in this Court in which the controlling case was required to be the SAME IN POINT are Browden, Manget & Co. v. Blake & Madden, 68 S.E. 837, 135 Ga. 71; Keaton v. Forkas, 70 S.E. 1110, 136 Ga. 188; Hall v. Mayor and Council of Calhoun, 79 S.E. 533, 140 Ga. 611; McIntyre v. City of Vidalia, 185 S.E. 318; Albany Federal Savings and Loan Assn. v. Henderson, 31 S.E. 2nd 20, 198 Ga. 116.

As far back as 1885 this Court found that a case could not control if there was a difference in the facts or issues. In Wright v. Lake, 75 Ga. 219, this Court held: "The points directly involved in those cases do not control this * * are not binding as a decision where the facts are different."

None of the facts in the appeal of Southland Incorporated is covered in the appeal of Cox Enterprises, the "controlling case."

This Court in its present decision failed to recognize this case.

In Dixon v. Minnesota Lumber Co., 64 S.E. 71, 132 Ga. 347, this court held "A case is not controlling where the subject matter is different."

The "controlling" case here deals solely with staleness of an appeal, which is not the subject matter of the case which it controls.

In Terrell v. State, 114 S.E. 910, 29 Ga. App. 286, the case was controlled by a ruling in a companion case in which the facts were the same.

In Wise v. Ray, 112 S.E. 905, 28 Ga. App. 661, the Appeals Court held: "This is a companion case * * The two cases were tried together; the EVIDENCE IN THIS CASE IS THE SAME as in the other case * * and the ruling in that case is controlling in this."

In Central of Georgia Railway Co. V. Hartley, 103 S.E. 262, 25 Ga. App. 120, the Appeals Court held the case was controlled in NEARLY EVERY PARTICULAR by rulings made in another case growing out of the same transaction.

The Southland Incorporated appeal and the Cox Enterprises, Inc. appeal are NOT COMPANION CASES.

In Hunnicutt v. Graves, 72 S.E. 526, 10 Ga. App. 12, the Appeals Court held: "The law applicable to the issues made by the evidence in this case was fully stated in the opinion of this court when the case was here before."

In the present case none of the ISSUES MADE BY THE EVIDENCE is dealt with in the "controlling case."

In Stanley v. Dominy, 26 S.E. 2nd 355, 196 Ga. 192, this Court held that the rule of stare decisis would hold in a subsequent case for injunction in the same matter.

In Robinson v. Dumas, 42 Ga. 614, the judgments were on the SAME POINTS made in the controlling decision.

In Wallace v. Matthewson, 84 S.E. 450, 143 Ga. 237, this court held the injury was THE SAME as in the controlling case.

In Peppers v. Travelers' Insurance Co., 173 S.E. 177, 48 Ga. App. 595, the Appeals Court held: "Where MATERIAL FACTS OF CASE WERE IDENTICAL with those in the case previously decided, the previous decision was controlling."

How can the Cox Enterprises decision be found to control the original Southland appeal when the Cox decision deals with entirely different subject matter and does not consider any of the facts in the Southland case? How can the new case serve to dismiss the appeal in the earlier case?

Plaintiff contends it is a violation of a well established principle of law and justice as well as a violation of both the Georgia and U. S. Constitutions to apply a law or decision retroactively. Article I, Section III, Paragraph II of the Georgia Constitution expressly provides: "No Bill of Attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grant of special privileges or immunities, shall be passed." (Ga. Code Sec. 2-302). Article I, Section IX, paragraph 3 of the U. S. Constitution provides that "No bill of attainder or ex post facto law shall be passed," and Article I, Section 10 of the U. S. Constitution provides in part: "No State shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." These provisions of the U. S. Constitution are applicable to the States under Section I of Amendment XIV thereof.

Whether this Court sees fit to reverse or affirm the judgment of the trial court in this case, Plaintiff is entitled to a decision on the points raised in its appeal. In the case of Moody and Wife vs. Davis, 10 Ga. 410-411, this court held in part: "The beautiful theory of a trial is this: Both sides are represented by counsel, that their rights may be settled, not by art or chicane or the tricks of the orator, but ACCORDING TO THE LAW. It is therefore the duty of counsel to present to the Court the points which he conceives are in favor of his client; and it is his right to be heard in argument to sustain them; and WHEN PRESENTED, IT IS THE DUTY OF THE COURT TO PASS UPON THEM, IF THEY GROW OUT OF THE CASE * * * If he declines to pass upon a principle thus moved,

and it springs out of the case, such declining is error * * * As officers of the Court, the duties of counsel are not in conflict with those which devolve upon him as the representative of a party. They are THE FRIENDS OF THE COURT, enlisted with him in the sublime work of discovering truth, and dealing out justice between man and man. It is not the duty of counsel to suggest points of law which are against his client; but it is his duty to insist upon no point which he knows to be contrary to law. Whilst judgment belongs alone to the Judge - enlightenment is the province of the lawyer, and I apprehend that no Judge can be found so presumptuously vain, or so flagrantly unjust, as not to recognize, and that too with grateful emotions, the aid which he derives, in the discharge of duties more solemn than belong to any other functionary, from an able bar. * * * It is the duty of the Judge to enforce the laws of the State, made in accordance with the State and Federal Constitutions - THE WHOLE LAW, as it applies, in his judgment, to the cases which come before him. He has no right and no power to withhold the application of one single principle of law to a single case over which he has jurisdiction; he has no dispensation justifying or excusing an omission to APPLY THE LAW. * * *"

As to the date the transcript was ordered, the president of the plaintiff corporation testified in an affidavit in the record of this Case, 25917, and again in a separate pleading in Case 26026 as follows:

"On April 8, 1969, four days after the trial, I paid the plaintiff's half of the takedown costs and ORDERED THE TRANSCRIPT prepared for appeal."

This is plain, positive and direct. It is the type of testimony which is given preference in decisions of this Court and by Ga. Code Sec. 38-111.

Direct and positive testimony (such as that of the plaintiff president) has been given

preference to negative, self-contradictory, vague, evasive and equivocal testimony (such as that of the defendants) by this Court in Southern Railway Co. v. Hobbs, 121 Ga. 428, 49 S.E. 294; and Steele v. Central of Ga. Ry. Co., 123 Ga. 237, 51 S.E. 438.

The same principles have been upheld by the Court of Appeals in Allison v. Cobb County, 98 Ga.App. 231, 103 S.E.2nd 195; and Dowling v. Tracy, 116 Ga. App. 43, 156 S.E.2nd 524.

The court reporter had opportunity in an affidavit and in oral testimony, both recorded in the transcript of the Motion to Dismiss the Appeal (which will be referred to subsequently as T-MDA) to refute and deny directly the aforesaid evidence, but he did not do so. He had opportunity to deny that he had reported the evidence missing for many months. He did not do so.

This Court in 26026 described the evidence on the date the transcript was ordered as "conflicting" but obviously overlooked the affidavit of the president of the plaintiff corporation.

The evidence given by the reporter was not merely conflicting, it was self-contradictory, negative, vague, evasive and equivocal. Yet this testimony was accepted by the trial court and by this court as the basis for saying the delay in the appeal was caused by the plaintiff.

In his affidavit (T-MDA 6 Par 3) the reporter says:

"TO THE BEST OF MY RECOLLECTION, the first time that the plaintiff in this action or anyone on behalf of the plaintiff, ordered any type of transcript with respect to said hearing was during August or September, 1969".

Next paragraph:

"TO THE BEST OF MY RECOLLECTION, the next time, etc."

(T-MDA 7 Par 3) "TO THE BEST OF MY KNOWLEDGE, the next time, etc."

When questioned on the stand by counsel for the defendants as to who ordered the transcript, and when, the reporter replied: (T-MDA 38 Par 2)

"A. The best I remember it was Mr. Taylor,

and again, the best I remember because I don't have any notes about any specific date, but July, August, or September of last year, 1969."

This was the vague and equivocal evidence which the court below, and this court, accepted in preference to the direct and positive statement of the exact date as given by the president of the plaintiff corporation.

On this evidence both courts have concluded that the plaintiff delayed its decision to order the transcript until August, 1969 and that this caused the delay in the appeal.

In answer to defense counsel's simple question, "At that time what did Mr. Taylor ask you to do?" the record at T-MDA 38 last Par., gives this classic example of evasion, vagueness and equivocation:

"A. Well, I had previously talked to Mr. Breen, I just saw him up here one day. He said that - well as a matter of fact I saw him the day that he filed the notice for appeal and he said that they were going to, AS I REMEMBER, proceed without the record, try to proceed without the record. (Mr. Breen filed an affidavit in 26026 as a separate pleading categorically denying this statement). That, I THINK, was in May, I THINK, is when the order was signed by (sic) the appeal, the appeal notice was signed. Then Mr. Taylor, around in July, August, I don't think it was September, but July or August, I THINK, said that they would like to have the objections to the affidavits, I BELIEVE, that were presented during the trial and I got those out for him some time right after that."

Here he says "July" but in his previous affidavit he had testified the transcript was ordered in "August."

Plaintiff's evidence showed that he had paid the reporter $500 in advance for the transcript and $87.50 balance on its completion. (T-MDA 79 Par. 3). This was to speed up preparation of the appeal when the plaintiff feared the reporter was delaying the work because of lack of money.

This suspicion was confirmed by the

reporter when he testified (T-MDA 41 Par. 5):

"A. It would have been just prior to that but as far as I was concerned I wasn't going to start on it until I had the $200 because it was going to cost me at least that out of my pocket for a typist."

When examining counsel tried to get something definite on a date from the reporter the answer was: (T-MDA 42 bottom)

"A. Probably some time in March. That is JUST A WILD GUESS."

It was on the testimony of a reporter who made WILD GUESSES as to dates that the Plaintiff has been denied a review of its cause in this court when the crucial evidence was a matter of a date.

When defense counsel tried to pin down the reporter as to dates of talks with the president of the plaintiff corporation, the reporter testified: (T-MDA 43 Par. 4)

"A. I THINK I MAY have had a conversation with Mr. Taylor somewhere in this time."

At this point the Court asked: "Somewhere when?"

In his answer the reporter here obviously tried to shirk responsibility for the missing exhibits as shown below:

"THE WITNESS: Somewhere in this - between December and late April. Now it may have been March, and it had something to do with the exhibits. I THINK he called me and asked me where the exhibits were and I - at that time I THINK I asked him, 'Well, doesn't Mr. Aiken have them?' He said 'No' and I said 'Well, then maybe the judge has them,' because I remember that during this time you (the Judge) and Mr. Henderson (the Court's law clerk) had them for a while and then I had them for a while."

The president of the plaintiff corporation had testified (T-MDA79 last par.) that when he had asked the reporter why he was so long preparing the transcript the reporter told him the exhibits were missing. The reporter never denied this.

The missing exhibits finally were found,

after nearly 13 months, in a cabinet in an ante room of the court when a special search was made by the reporter, another reporter, and the court's law clerk.

The search and finding of the exhibits are described by the reporter in testimony at T-MDA 44 Par. 1.

Thus it is clear that the appeal was delayed by missing exhibits due to the negligence of the trial court's reporter. After the typed portion of the transcript was completed the filing was delayed five months more because the EVIDENCE WAS STILL MISSING and the appeal could not be filed without it.

After the evidence was found the appeal was transmitted within a few days and within the time allowed by the last timely extension.

Throughout the nearly 13 months the evidence was missing, the plaintiff's president diligently inquired frequently of the reporter, of court officials and the clerk, and finally of the court's law clerk, who insisted that the missing evidence was not on the court's premises. (T-MDA 80 Par. 3) (T-MDA 81 Par. 2)

It was after this development that the reporter was challenged by the president of the plaintiff corporation to produce the missing documents as his responsibility. Then the reporter enlisted another reporter and the court's law clerk in a search that revealed that the missing evidence was in a cabinet in the anteroom of the trial judge. (T-MDA 44 Par. 1)

CONCLUSION

The said judgment of this Court deprives Plaintiff of its property consisting of its constitutional right of ingress and egress, unimpeded and unobstructed, to and from its place of business by way of the public streets leading thereto, without Due Process of Law and without Equal Protection of the Law in violation of Article I, Section I, Paragraphs I, II, III, IV, and XXIII, and Article VI, Section II, Paragraph IV of the Georgia Constitution ; and Amend-

ments V, IX, and X of the U. S. Constitution as applied to the States by Section I of Amendment XIV thereof, by depriving it of the applicable and controlling law applied to other persons and corporations in like circumstances and similar situations, in the foregoing particulars.

This Honorable Court is therefore urged to pass upon the grave and substantial legal and constitutional questions raised in plaintiff's appeal in this case, No. 25917.

Respectfully submitted,
/s/ G. Seals Aiken
G. SEALS AIKEN
Attorney for Southland Incorporated

SUPREME COURT OF GEORGIA 25917

Atlanta, October 22, 1971

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Southland, Incorporated. v. Cox Enterprises, Inc., et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta, Feb. 1, 1971

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said Court hereto affixed the day and year last above written.

/s/ Hazel E. Hallford, Deputy Clerk.

IN THE SUPREME COURT OF GEORGIA

COX ENTERPRISES, INC., DOING BUSINESS AS ATLANTA NEWSPAPERS, INC., ET AL, APPELLANTS	CASE NO. 26026
VS.	
SOUTHLAND INCORPORATED, APPELLEE	

MOTION OF SOUTHLAND INCORPORATED TO THE SUPREME COURT OF GEORGIA FOR A REHEARING.

Now comes Southland Incorporated, Appellee in the above stated case, during the term in which judgment was rendered for Appellants Cox Enterprises, Inc., doing business as Atlanta Newspapers, Inc., et al, and within the time provided by law, and makes this its motion for a rehearing. It will be referred to in this motion as plaintiff and Cox Enterprises, Inc. et al as Defendants, the respective positions they occupied in the trial court.

The judgment of this Court complained of was rendered October 8, 1971.

This Court has very obviously overlooked some material facts in the record, some statutes, and some decisions which are controlling as authority and which would require a different judgment from that rendered, and has erroneously construed and misapplied provisions of law and controlling authorities. The said material facts in the record and controlling statutes, decisions, authorities, and provisions of law are specified briefly below.

At the close of the trial in the lower court on April 4, 1969, the Court Reporter misplaced all of the documentary evidence (258 pages of exhibits, including affidavits, charts, photographs, plats, etc.) and did not find it until April 24, 1970, nearly 13 months later, thus delaying the preparation and filing of the transcript of the evidence necessary to be transmitted with Plaintiff's appeal to the Supreme Court. This is the uncontroverted evidence in the record. Despite this uncontradicted evidence, the lower court, and this court in deciding this Case, No. 26026, stated that the

delay was inexcusable and was caused by the Plaintiff. At no time was the Plaintiff in custody or control of the missing evidence, and at no time was care of the evidence the responsibility of the Plaintiff.

The dismissal of Plaintiff's appeal by this Court deprives it of its property without due process of law and without equal protection of the law in violation of Article I, Section I, Paragraphs II, III, and IV of the Georgia Constitution and Section I of Amendment XIV of the U. S. Constitution as applied to the States, by depriving it of its right under the said provisions of the Georgia and U. S. Constitutions to a review of the erroneous judgment of the trial court granted to other persons in like circumstances and similar situations.

THE UNCONTRADICTED EVIDENCE IS THAT THE PLAINTIFF WAS DILIGENT AT ALL TIMES IN ITS EFFORTS TO HAVE THE TRANSCRIPT COMPLETED AND TRANSMITTED WITH THE APPEAL PROMPTLY TO THIS COURT.

When considering the reporter's conflicting statements about the dates the transcript was ordered, it must be borne in mind that the reporter was embarrassed by the fact he had lost the 258 pages of documentary evidence and was on the defensive.

In his affidavit and in his testimony on the stand the reporter was vague, indefinite, evasive and equivocal in his reporting of dates.

There was nothing vague, equivocal or indefinite in the evidence on the date of ordering the transcript as given in the affidavit of the president of the plaintiff corporation (the appellee), which was timely filed before argument in the case.

This evidence shows that the transcript was ordered on April 8, 1969, four days after the close of the trial in the lower court. The transcript could not be filed until after April 24, 1970 when the reporter, along with another reporter and the court's law clerk, made a search of the court's premises and found the missing evidence in an anteroom of the court.

The complete transcript with the 258 pages of evidence properly arranged, indexed and bound was

filed two weeks after the missing evidence was found.

Since the court in this decision has recited in detail the contentions of the Appellant Cox Enterprises and nowhere does it state the defenses of the Appellee, it must be assumed that the Court overlooked the pleadings of the Appellee, including the affidavit of its president.

When the court reporter loses the documentary evidence, delaying the appeal, how can it be said that Southland Incorporated causes the "unreasonable delay"?

This Court in its decision cited the case of Rogers v. McDonald, 226 Ga. 329. If this court considered the evidence and applied the same principles it would reach the same decision in this case, namely that "it was not shown that the appellant was in any way responsible for the length of time being taken by the reporter to prepare the transcript."

The Appellee in this action of course was the Appellant in the original appeal.

This Court's decision says:

"There is nothing which shows that the defendants knew that notwithstanding the plaintiff's claim that additional time was required, any such need was due to his (sic) own delay in ordering the transcript."

This statement is eminently correct. The plaintiff's claim that additional time was required WAS NOT DUE TO ITS OWN DELAY IN ORDERING THE TRANSCRIPT. The defendants could not have known it and no one else could have known it, because it was not true.

Additional time was required because the evidence was missing and time was required to search for the missing documents.

This court cites the case of Fahrig v. Garrett, 224 Ga. 817, (165 S.E.2nd 126). If the Court will read this case again it will see that Fahrig deals with an appeal in which no extension for filing had been granted. This situation distinguishes it from the present case.

This Court in its decision says:

"There is nothing in our statutes or decisions which requires that the obtaining of

extensions per se excuses an appellant from the consequences of his own unreasonable delay."

We agree. If we had caused an unreasonable delay, or any delay, we would not rely on the extensions.

The Court's statement above is based on the assumption that the plaintiff caused the delay, an assumption which is not supported by the evidence.

When a court reporter "loses" or misplaces all the documentary evidence in a case and thus delays an appeal thirteen months (T. 79-81) during which the defendants are able to bring to near completion a building (R.93) which the suit seeks to enjoin (R.2), it would be a miscarriage of justice to hold that the delay was caused by the appellant, (Appellee in this appeal) (R.84; T.33 last par.)

Southland Incorporated, plaintiff, performed all of its responsibilities in the case when it filed timely notice of appeal (R.60), ordered the transcript and evidence prepared by the reporter (T.79), paid him in advance (T.79; T.41 Par. 5), paid all costs promptly (T.23 line 2), diligently sought and obtained proper extensions of time (R.11-45-46-47-49), and filed and transmitted the record, transcript and evidence to this court within the time allowed by the last extension (R.56-64).

This Court pointed out in support of its decision that during the delay 75 per cent of the construction was completed. The court must know that the defendants constructed the building at their peril.

This Court pointed out in support of its decision that the defendants expended a large financial outlay in constructing the building. We contend that no expenditure, no matter how large, can justify in law or equity the erection of an obstruction in the public streets.

We agree that in this appeal there has been unreasonable and inexcusable delay. However, the statement that the delay was caused by the plaintiff is not shown by the evidence.

The evidence is that the delay was caused by missing exhibits, the responsibility of the

reporter. The defendants have argued, despite evidence to the contrary, that the plaintiff caused the delay by late ordering of the transcript.

The transparency of this argument, however, is shown by the fact that even after the reporter completed his typing with aid of a partial file of duplicate exhibits furnished by the plaintiff, the reporter still was unable to file the transcript because all the documentary evidence was still missing, and the filing was delayed another five months while plaintiff's search for the missing evidence continued.

Thus, even if it were true (but it was not) that the plaintiff was late in ordering the transcript, the appeal could not be transmitted without the exhibits which were missing 13 months.

Thus the date of ordering the transcript to which the trial court attached undue importance is irrelevant in determining the cause of the delay. The missing evidence was the sole cause of delay.

Dereliction of duty and irresponsibility in caring for evidence on the part of court reporters seldom appear in Georgia case law, but we have found the circumstances in the present case duplicated in cases cited in several other jurisdictions. The present case is the only case we have been able to find in any jurisdiction in which a litigant has been denied a review in an appellate court by reason of the negligence of a reporter.

In Indianapolis Life Insurance Co. v. Lundquist, 53 N.E.2d 338, 222 Ind. 359, it was held:

"9. Official court reporters are an arm of the court, with duty of preserving a record of the evidence, and a failure to make such record available is a failure of the court which entitles injured party to equitable relief.

"11. Where reporter's notes and exhibits were lost beyond recovery through no fault of appealing defendant, and it would be impossible to procure a bill of exceptions without them, defendant was entitled to a new trial unless parties could agree on bill of exceptions."

CJS Vol. 66, Sec. 98, says:

"New trials have been granted where a review of the case has been prevented by the loss of the files, or of instructions, or of the official stenographic notes of the proceedings, OR EXHIBITS."

CJS Vol. 66, Sec. 98, page 280 says:

"Where the unsuccessful party has been deprived, without his fault or negligence, of the official stenographer's transcript of the evidence, or of an official transcript of the record in time to obtain a review of the case, a new trial may be granted in some jurisdictions."

In J. H. Taylor Trust v. Driggs, 143 P.2d, 193 Okla. 346 (which cites Cherry v. Brown, 192 P.227) it was held:

"Where a reporter lost shorthand notes, making it impossible for her to transcribe the evidence, thereby precluding plaintiff from completing his appeal, and plaintiff and his counsel were free from negligence and had used reasonable diligence to complete case-made within time prescribed by law, plaintiff was entitled to new trial."

In Harris v. First National Bank, 282 P. 1097, 140 Okla. 269, it was held:

"RELIANCE ON COURT REPORTER NOT NEGLIGENCE. It is neither slight, ordinary nor gross negligence on the part of the complaining party or his counsel to rely on the court reporter furnishing him with a transcript of his stenographic notes of the evidence and proceedings, for the purpose of incorporating it in case-made for appeal or proceeding in error, within the time allowed by law to make and serve case-made."

In Ferber v. Leise, 151 N.W.307, 97 Nebr., 795, it was held:

Headnote: "A court of equity will grant a new trial in a proper case where a party has been deprived of a bill of exceptions by reason of the inability of the stenographic reporter to furnish a transcript of the testimony in time."

The decision says in part:

"It is claimed that it must be alleged and shown that there was error in the court below in favor of the party who seeks relief.

"It is enough that he has been denied his Constitutional right of review in the proceedings. It is not a case alone where he has been beaten in a meritorious controversy alleged and proven. It is just a case where he has been denied the right to review the proceedings of the court below.

"Sec. 2 Art. I of the Constitution of the state reads:

"'The right to be heard in all civil cases in the court of last resort by appeal, error or otherwise, shall not be denied.'

"It does not say all meritorious cases, but all civil cases. This means that none is to be excluded.

"If the power was forbidden to be exercised except in those cases where errors are alleged and proven, or when merit must first be shown, then the appellate court might consider the case before it was properly reached, and so not have an opportunity to consider it as it ought to be considered; or it might refuse to consider it at all.

"In any event, the people, by the adoption of this provision of the Constitution, have said to the Supreme Court, you must not deny 'the right to be heard', and this right applies to all civil cases.

"It is apparent from the petition that the plaintiff was not at fault and that her failure to present the bill of exceptions within the time limited was due wholly to the inability of the official stenographic reporter to prepare the transcript of evidence."

In Zweibel v. Caldwell, 72 Nebr. 47, 99 N.W. 843, 102 N.W. 84, it was held:

"The Constitution, in guarantying to every litigant a review of his case in the Supreme Court (Con. Art. 24) would seem to indicate that equity would interfere, even to the extent of granting a new trial, to preserve such a right of review if it had been prevented without fault of the party himself. In the present case the trial court found - and we are not prepared to say that its findings are contrary to the weight of evidence - that the right of review had been lost without fault on the part of the complaining party

because of the failure of the clerk to make the transcript.

"There is no finding as to whether this was the clerk's fault or misfortune.

"In any event, it was his duty to find the files and make the transcript. It would seem that Zweibel and his counsel had the right to depend on him for it.

"The jurisdiction assumed here for the granting of a new trial cannot be claimed under any recognized head of equity jurisdiction. It must be found if at all under Sec. 318 of the Code and the provision of our Constitution in securing to the litigant in every case a review in the court of last resort.

"Section 13 of the Articles of the Constitution, providing that the court shall be open to every person for any injury done, and that he shall have a remedy, has been held to be broader than the common law, and to entitle the courts to grant a remedy whenever a wrong has been done. State ex rel Benton v. Elder, 31 Nebr. 185, 47 N. W.710, 10 L.R.A. 796. (Similar provision is made in Georgia's Bill of Rights, Code 2-104).

"The view of the district court that the defendant in the ejectment suit (the plaintiff here) had lost his right of review without fault on his part, and after making all required effort to obtain it, and was therefore entitled to a new trial, is sustainable from the evidence, and should be sustained here, if the underlying doctrine is granted that such loss of right of review entitles one to a new trial without the necessity of any showing of probable error sufficient to reverse the action of the court at the ejectment trial."

In Reynolds v. Romano, 96 Vt. 222, 118A. 810, we find:

Headnote 2. NEW TRIAL. Facts resulting in loss of benefit of exceptions held to warrant new trial.

The decision held in part:

"Where a case was heard in one term of court, but findings and judgment not entered until

the next, within which interval the court reporter terminated his employment and left the state, and when called on to furnish a transcript and record of the exceptions saved refused to do so, and these facts were certified to by the court, held that under Gen. Laws 2296 such facts constituted sufficient grounds for a new trial if they occurred without petitioner's fault and that he was not chargeable with lack of diligence or negligence merely because he did not attempt some idle ceremony which would obviously have been of no avail without the help of the reporter.

"(2) The facts certified in the bill of exceptions (and they are fully sustained by evidence in support of the petition) clearly make a case for a new trial under GL 2296.

"The right of a party to have his exceptions heard in this court is a substantial right, the loss of which entitles him to a new trial if it has occurred without his fault.

"It is urged that the failure to get a hearing on his exceptions was due to plaintiff's own negligence; but plainly this is not the case.

"Under the present practice in the county the record of the trial is kept by the stenographic reporter, an official of the court. Both court and counsel rely upon him for a record of the exceptions taken during the trial."

CONCLUSION

The said judgment of this Court deprives Plaintiff of its property consisting of its constitutional right of ingress and egress, unimpeded and unobstructed, to and from its place of business by way of the public streets leading thereto, without Due Process of Law and without Equal Protection of the Law in violation of Article I, Section I, Paragraphs I, II, III, IV, and XXIII, and Article VI, Section II, Paragraph IV of the Georgia Constitution; and Amendments V, IX, and X of the U. S. Constitution as applied to the States by Section I of Amendment XIV thereof, by depriving it of the applicable and controlling law applied to other

persons and corporations in like circumstances and similar situations, in the foregoing particulars.

This Honorable Court is therefore urged to reverse its erroneous and unconstitutional decision in case No. 26026 and to pass upon the grave and substantial legal and constitutional questions raised in Plaintiff's appeal in case No. 25917.

Respectfully submitted,
/s/ G. Seals Aiken
G. SEALS AIKEN,
Attorney for Southland Incorporated, Appellee

SUPREME COURT OF GEORGIA 26026

Atlanta, October 22, 1971

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Cox Enterprises, Inc., et al. v. Southland, Incorporated.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta, Feb. 1, 1971

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Hazel E. Hallford, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF GEORGIA

SOUTHLAND INCORPORATED, APPELLANT VS. COX ENTERPRISES, INC. DOING BUSINESS AS ATLANTA NEWSPAPERS, INC., ET AL,	NO. 25917
APPELLANTS VS. SOUTHLAND INCORPORATED, APPELLEE	NO. 26026

MOTION OF SOUTHLAND INCORPORATED TO WITHHOLD REMITTITUR FOR NINETY DAYS FROM DATE OF DENIAL OF ITS MOTIONS FOR REHEARING IN ORDER TO ENABLE IT TO PREPARE AND FILE WITH THE U. S. SUPREME COURT A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Now comes Southland Incorporated and moves this Court for a stay of the remittitur for a period of ninety days from October 22, 1970, the date of denial by this Court of its motions for rehearing, in order to enable it to prepare and file with the U.S. Supreme Court a petition for a writ of certiorari to this court to review, revise, and reverse its said denial of said motions for rehearing.

This motion is based upon the ground that the said denial of said motions for rehearing deprives Southland Incorporated of its property consisting of its constitutional right of ingress and egress, unimpeded and unobstructed, to and from its place of business by way of the public streets leading thereto, without Due Process of Law and without Equal Protection of the law in violation of Article I, Section I, Paragraphs I, II, III, IV, and XXIII, and Article VI, Section II, Paragraph IV of the Georgia Constitution under Section I of Amendment XIV of the U.S. Constitution; and in violation of Amendments V, IX and X of the U. S. Constitution as applied to the States by Section I of Amendment XIV thereof, by depriving it of the applicable and controlling law applied to other persons and corporations in like circumstances

and similar situations.

Respectfully submitted,

G. SEALS AIKEN,
Attorney for Southland, Incorporated

SUPREME COURT OF GEORGIA 25917, 26026
Atlanta, November 2, 1970

The Honorable Supreme Court Met Pursuant to Adjournment.
By Chief Justice Almand:
The following direction was given:
Southland, Incorporated v. Cox Enterprises, Inc., et al.
Cox Enterprises, Inc., et al v. Southland, Incorporated.

Upon consideration of the motion of Southland, Incorporated, for a stay of this court's remittiturs in order that it may file in the Supreme Court of the United States an application for certiorari to obtain a review of this court's judgments rendered in these cases on October 22, 1970, such motion is hereby granted subject to the following conditions:

The clerk of this court is directed to withhold the transmittal of such remittiturs to the trial court for ninety days from October 22, 1970, and until the final disposition of the said cases by that court; Provided that promptly upon the filing of such application in the Supreme Court of the United States, counsel for the applicant shall notify the clerk of this court thereof in writing and also shall promptly notify the clerk of this court of any judgment of that court denying such application, or, if no such application be filed in that court within the said ninety day period or within an authorized extension thereof, counsel for applicant shall in writing promptly so notify the clerk of this court.

This 2nd day of November, 1970.

/s/ Bond Almand
Chief Justice

SUPREME COURT OF THE STATE OF GEORGIA,
Clerk's Office, Atlanta,
Witness my signature and the seal of said court

hereto affixed the day and year last above written.
/s/ Joline B. Williams Clerk

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON

STATE OF GEORGIA

SOUTHLAND, INC. Plaintiff vs. COX ENTERPRISES, INC. d/b/a/ ATLANTA NEWSPAPERS, INC., BATSON-COOK COMPANY AND CITY OF ATLANTA Defendants	No. B-44470

ORDER

The above matter came on for a hearing for a temporary injunction, and after considering evidence and argument of counsel, the Court enters the following order in connection with the defendant Cox Enterprises, Inc., d/b/a/ Atlanta Newspapers, Inc. oral motion to dismiss which the Court treats as one for summary judgment.

Movant contends that whatever damage, if any, that Plaintiff suffers to his leasehold interest does not differ in kind but only in degree from the damage, if any, suffered by the public in general.

The Plaintiff admittedly is not an abutting owner of leases of abutting property. Whatever loss he has suffered is a loss without injury in the legal sense and hence one without redress by legal action.

Therefore, said motion as thus considered by the Court is sustained and said action is hereby dis-

missed as to said defendant.

It is so ordered this 4th day of April, 1969.

Judge Sam Phillips McKenzie

ORDER

The above matter came on for a hearing for a temporary injunction, and after considering evidence and argument of counsel, the Court enters the following order in connection with the defendant Atlanta Newspapers, Inc.'s oral motion to dismiss which the Court treats as a motion for summary judgment:

Movant contends that whatever damage, if any, plaintiff suffers to his leasehold interest does not differ in kind but only in degree from the damage, if any, suffered by the public in general.

The plaintiff admittedly is not an abutting owner or leasee of abutting property. Whatever loss he has suffered is a loss without injury in the legal sense and hence one without redress by legal action.

Therefore, said motion of Atlanta Newspapers, Inc., as thus considered by the Court is sustained and said action is hereby dismissed as to said defendant.

It is so ordered.

This 4th day of April, 1969.

SAM PHILLIPS McKENZIE, JUDGE
SUPERIOR COURT, A. J. C.

ORDER

The above matter came on for a hearing for a temporary injunction, and after considering evidence and argument of counsel, the Court enters the following order in connection with the defendant

Batson-Cook Company's oral motion to dismiss which the Court treats as one for summary judgment.

Movant contends that whatever damage, if any, that Plaintiff suffers to his leasehold interest does not differ in kind but only in degree from the damage, if any, suffered by the public in general.

The Plaintiff admittedly is not an abutting owner or leasee of abutting property. Whatever loss he has suffered is a loss without injury in the legal sense and hence one without redress by legal action.

Therefore, said motion as thus considered by the Court is sustained and said action is hereby dismissed as to said defendant.

It is so ordered this 4th day of April, 1969.

/a/ Sam Phillips McKenzie
Judge

ORDER

The above matter came on for a hearing for a temporary injunction, and after considering evidence and argument of counsel, the Court enters the following order in connection with the defendant City of Atlanta's oral motion to dismiss which the Court treats as one for summary judgment:

Movant contends that whatever damage, if any, Plaintiff suffers to his leasehold interest does not differ in kind but only in degree from the damage, if any, suffered by the public in general.

The Plaintiff admittedly is not an abutting owner or leasee of abutting property. Whatever loss he has suffered is a loss without injury in the legal sense and hence one without redress by legal action.

Therefore, said motion as thus considered by the Court is sustained, and said action is hereby dismissed.

It is so ordered this 4th day of April, 1969.

Judge Sam Phillips McKenzie

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON
STATE OF GEORGIA

SOUTHLAND, INCORPORATED, Plaintiff vs. COX ENTERPRISES, INC., DOING BUSINESS AS ATLANTA NEWSPAPERS, INC., ATLANTA NEWSPAPERS, INC., BATSON-COOK COMPANY, AND CITY OF ATLANTA, Defendants	CIVIL ACTION NO. B-44470

EXTENSION OF TIME IN WHICH TO PREPARE, CERTIFY AND TRANSMIT TO SUPREME COURT THE RECORD ON APPEAL DESIGNATED BY SOUTHLAND, INCORPORATED, PLAINTIFF AND APPELLANT.

It appearing to the Court that approximately ninety days will be required in which to prepare the record on appeal designated by Plaintiff and Appellant,

It is considered, ordered and adjudged that the time in which to prepare the said record be, and it is hereby extended to and including August 15, 1969.

This the 1 day of May, 1969.

/s/ Sam Phillips McKenzie
JUDGE OF FULTON SUPERIOR COURT

EXTENSION OF TIME IN WHICH TO PREPARE, CERTIFY AND TRANSMIT TO SUPREME COURT THE RECORD ON APPEAL DESIGNATED BY SOUTHLAND, INCORPORATED, PLAINTIFF AND APPELLANT.

It appearing to the Court that approximately sixty more days from October 15, 1969 will be required in which to prepare the record on appeal designated by Plaintiff and Appellant,

It is considered, ordered and adjudged that the time in which to prepare the said record be, and it is hereby extended to and including

December 14, 1969.

This the 6th day of October, 1969.

Signed: Sam Phillips Mc Kenzie
JUDGE OF FULTON SUPERIOR COURT

EXTENSION OF TIME IN WHICH TO PREPARE, CERTIFY AND TRANSMIT TO SUPREME COURT THE RECORD ON APPEAL DESIGNATED BY SOUTHLAND, INCORPORATED, PLAINTIFF AND APPELLANT.

It appearing to the Court that approximately sixty more days from December 14, 1969 will be required in which to prepare the record on appeal designated by Plaintiff and Appellant,

It is considered, ordered and adjudged that the time in which to prepare the said record be, and it is hereby extended to and including February 12, 1970.

This the 9th day of December, 1969.

/s/Claude Shaw
JUDGE OF FULTON SUPERIOR COURT

EXTENSION OF TIME IN WHICH TO PREPARE, CERTIFY AND TRANSMIT TO SUPREME COURT THE RECORD ON APPEAL DESIGNATED BY SOUTHLAND, INCORPORATED, PLAINTIFF AND APPELLANT.

It being made to appear to the Court that approximately ninety more days from February 12, 1970 will be required in which to prepare the record on appeal designated by Plaintiff and Appellant;

It is considered, ordered and adjudged that the time in which to prepare the said record be, and it is hereby extended to and including May 12, 1970.

This the 2 day of February, 1970.

/s/Luther Alverson
JUDGE OF FULTON SUPERIOR COURT

ORDER

The foregoing motion of the defendants, Cox Enterprises, Inc. and Atlanta Newspapers, Inc., having been read and considered, the same is hereby allowed and ordered filed, and it is hereby

ORDERED that plaintiff, Southland, Incorporated, show cause before the Undersigned Judge of this Court on the 13 day of May , at 1 O'clock P.M., then and there to be heard, why said appeal should not be dismissed as prayed for in said motion.

FURTHER ORDERED that said motion, together with a copy of this order, be served upon the parties to this action as provided by law.

This May 8 , 1970.

/s/Sam Phillips McKenzie
Judge, Superior Court
Atlanta Judicial Circuit
MINUTES 524 PAGE 555

Filed in office May 8 1970
Ruby H. Ward
Deputy Clerk Superior Court
Fulton County Georgia

IN THE SUPERIOR COURT OF THE
COUNTY OF FULTON
STATE OF GEORGIA

SOUTHLAND INCORPORATED	)
VS.	) Civil Action
COX ENTERPRISES, INC., DOING	) File No. B-
BUSINESS AS ATLANTA NEWSPAPERS, INC.	) 44470
BATSON-COOK COMPANY; and	) Book 2488
CITY OF ATLANTA	) Page 545

MOTION OF SOUTHLAND INCORPORATED TO DISMISS THE MOTION OF COX ENTERPRISES, INC. AND ATLANTA NEWSPAPERS, INC. TO DISMISS PLAINTIFF'S APPEAL TO THE SUPREME COURT OF GEORGIA.

Now comes Southland Incorporated and moves this Court to dismiss the motion of Cox Enterprises, Inc. and Atlanta Newspapers, Inc. to dismiss the appeal of Southland Incorporated to the Supreme Court of Georgia upon the ground that the transcript of the

evidence and proceedings has been certified by the court reporter and filed with the clerk of this court and the clerk of this court has prepared the record for transmittal to the Supreme Court and a certificate to accompany the same and the plaintiff has paid the required costs on appeal, and said case has been docketed under No. 25917 in the Supreme Court of Ga. and that this court has therefore lost jurisdiction of this case for any purpose.

ORDER

The above Motion coming on for a hearing and after considering same said Motion is hereby dismissed. The basis for the ruling is reflected in the record as this reported.

This 13th day of May, 1970.

Judge S.P. McKenzie

Filed in office May 21 1970
R. L. Lawson
Deputy Clerk Superior Court
Fulton County Georgia

Minutes 524 Page 551

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SOUTHLAND, INC.	)	
VS.	)	CIVIL ACTION
COX ENTERPRISES, INC.	)	NO. B-44470
ATLANTA NEWSPAPERS, INC.	)	

ORDER

The above and foregoing cause came on before this Court for hearing on a motion to dismiss, under the provisions of Code Section 6-809(b), the appeal of the appellant, Southland, Inc., from an order of this Court. After hearing depositions and oral testimony, and considering same, the Court finds as follows:

This Court is of the opinion that the delay in filing the transcript in this case was unreasonable and inexcusable, and that this delay was caused by the appellant's failure to decide to order the transcript as a whole until the Fall of 1969.

This Court, however, recognizes the danger inherent in any statute which permits a trial court

to dismiss an appeal of its own rulings. In view of this and the fact that movants failed to object to the orders of extension previously entered, as well as the fact that said case has now been docketed in the Supreme Court and assigned for argument, this Court denies the motion to dismiss the appeal.

However, it is ordered that a transcript be made of this proceeding and this supplemental transcript be forwarded to the Supreme Court of Georgia as a part of the record in this case for determination as to whether or not the appeal should be dismissed.

This 20 day of May, 1970.

/s/ Sam Phillips McKenzie
JUDGE, SUPERIOR COURT, A.J.C.

IN THE SUPERIOR COURT OF THE COUNTY OF FULTON, STATE OF GEORGIA

7

SOUTHLAND, INCORPORATED VS. COX ENTERPRISES, INC., doing business as ATLANTA NEWSPAPERS, INC.; ATLANTA NEWSPAPERS, INC.; BATSON-COOK COMPANY; and CITY OF ATLANTA	CIVIL ACTION NO. B-44470 CERTIFICATE THAT IMMEDIATE REVIEW OF ORDER SHOULD BE HAD

The undersigned Trial Judge, who rendered the order in this action dated May 20, 1970, denying the motion of the defendants Cox Enterprises, Inc. and Atlanta Newspapers, Inc. to dismiss the appeal taken by the plaintiff, hereby certifies within ten (10) days of the entry thereof that such order is of such importance to the case that immediate review should be had.

This 26 day of May, 1970.

/s/ Sam Phillips McKenzie
SAM PHILLIPS McKENZIE
Judge, Superior Court
Atlanta Judicial Circuit

MINUTES 524 PAGE 591

Filed in office May 26 1970
Walter W. Miles

Deputy Clerk Superior Court
Fulton County Georgia 16

IN THE SUPERIOR COURT OF THE
COUNTY OF FULTON, STATE OF GEORGIA

SOUTHLAND, INCORPORATED	
V.	
COX ENTERPRISES, INC. doing business as ATLANTA NEWSPAPERS, INC.; ATLANTA NEWSPAPERS, INC.; BATSON-COOK COMPANY; and CITY OF ATLANTA	CIVIL ACTION NO. B-44470

ORDER

It appearing that the record in the above action has been transmitted to the Supreme Court of Georgia pursuant to the Notice of Appeal filed herein by the plaintiff, Southland, Incorporated, and the Court having heretofore entered an order, dated May 20, 1970, which, among other things, directs the Clerk of this Court to transmit a supplemental transcript to the Supreme Court of Georgia, and it further appearing that the following additional matters, which are material to Cox Enterprises, Inc. and Atlanta Newspapers, Inc., two of the Appellees in said appeal, have been omitted from such record on appeal:

1. Exhibit A to the affidavit of Mr. William I Ray, Jr., which affidavit is set forth at pages T. 500 through T. 512 of the transcript heretofore transmitted to the Supreme Court of Georgia, and which exhibit, it appears, should have been inserted at page T. 507 of such transcript.

2. The order of Court entered herein on May 20, 1970, on the motion of the defendants Cox Enterprises, Inc. and Atlanta Newspapers, Inc. to dismiss the appeal of plaintiff, Southland, Incorporated.

3. The motion of the defendants, Cox Enterprises, Inc. and Atlanta Newspapers, Inc. to dismiss the appeal taken by Southland, Incorporated, plaintiff, which motion was filed for record on

May 8, 1970.

4. The answer of Southland, Incorporated, plaintiff, to said motion of defendants, Cox Enterprises, Inc. and Atlanta Newspapers, Inc., which answer was filed for record on May 12, 1970.

5. The motion of Southland, Incorporated, plaintiff, to dismiss said motion of the defendants, Cox Enterprises, Inc. and Atlanta Newspapers, Inc., which motion was filed in open court on May 13, 1970, and filed for record on May 21, 1970.

Accordingly, pursuant to Ga. Code Ann. (6-805(f), and at the suggestion of said Appellees, the Court orders and directs the Clerk of this Court to prepare and certify a supplemental record which contains the foregoing matters and to transmit such supplemental record, together with the transcript of the proceedings in this action held before this Court on May 13, 1970, to the Supreme Court of Georgia.

This June 23rd, 1970.

/s/ Sam Phillips McKenzie
JUDGE, SUPERIOR COURT,
ATLANTA JUDICIAL CIRCUIT

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 19 1971
E. ROBERT SEAVER, CLERK

SUPREME COURT OF THE UNITED STATES

October term, 1970

No. 1251

SOUTHLAND INCORPORATED
Petitioner in Certiorari

v.

COX ENTERPRISES INC. AND ATLANTA NEWSPAPERS INC.
Defendants in Certiorari

Petition of Southland, Incorporated for writ of certiorari to the Supreme Court of Georgia.

G. Seals Aiken
Attorney for Petitioner
1409-10 Candler Building
Atlanta, Georgia 30303

INDEX

Page

Acknowledgment of Service----------46
Conclusion----------45
Constitutional Principles on Which Petitioner relies for allowance of writ:
1. Access to Courts----------27 29
2. Arbitrary and Capricious Decisions----5 23, 45
3. Contract----------29 31
4. Dual Jurisdiction---------- 5 10, 24, 29
5. Due Process---------- 4 7,8,10,11,13,14,15,16,19,20,28,42,43, 44,45
6. Eminent Domain----------22
7. Equal Protection ---------- 4 6, 10,11,12,15,21,27,28,29,37,38, 44,45
8. Evidence----------35
9. Full and Fair Trial---------- 5 6,9,23,27,29
10. Full Faith and Credit----------29
11. Ingress and Egress---------- 6 8,11,28
12. Judicial Question----------21 29,30
13. Limitations on Use of Highways--------18
14. Police Power----------18 20,22,23
15. Privileges and Immunities----------29 31
16. Property rights----------20 21,22,28,37,38,40,42,43,44,45
17. Public Interest----------33 39,41,43,45
18. Public Nuisance----------12 13,16,17,18,19,20,41
19. Retroactive Law---------- 2 5,30,31,32,33
20. Right to Review---------- 5

(Continued at Back)

SUPREME COURT OF THE UNITED STATES

October term, 1970

No. _____

SOUTHLAND INCORPORATED
Petitioner in Certiorari

v.

COX ENTERPRISES INC AND ATLANTA NEWSPAPERS INC.
Defendants in Certiorari

Petition of Southland Incorporated for writ of certiorari to the Supreme Court of Georgia, and direct and concise argument amplifying the reasons relied on for allowance of the writ.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Southland Incorporated, a Georgia corporation, files this its petition for writ of certiorari to the Supreme Court of Georgia

for the purpose of having reviewed, corrected and reversed the decisions and judgments of that Court of October 8, 1970 reversing the judgment of the Superior Court of Fulton County, Georgia in Civil Action No. B-48870 relative to a Motion to Dismiss and in dismissing an appeal of petitioner from a prior unfavorable judgment in the same court and in the same cause.

Case numbers assigned by the Supreme Court of Georgia were 25917 for the original appeal of Petitioner and 26026 for the appeal of opposite parties, based on an order following a special hearing on a Motion to Dismiss.

The last appeal filed (26026) was held to control the earlier case (25917).

Petitioner filed Motions for Rehearing in both appeals, which motions were denied October 22, 1970.

The original trial and the special hearing on the motion to dismiss the appeal were reported.

This petition for writ of certiorari seeks a review of the decisions and judgments of

the Supreme Court of Georgia in both cases, 25917 and 26026.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED.

The decisions of the Supreme Court of Georgia sought to be reviewed were rendered by that Court on October 8, 1970. They appear in 226 Georgia.

The motions of Petitioner for rehearing were denied October 22, 1970 and entered the same date.

The statutory provision believed to confer on this Court jurisdiction to review the judgments in question by writ of certiorari is Section 1257 (3) of Title 28 U.S.C.A. reading in part as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed in the Supreme Court as follows: **(3) By writ of certiorari, **where any title, right, privilege or immunity is specially set up or claimed under the

Constitution ** of ** the United States".

In addition, the Georgia courts have so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision.

THE QUESTIONS PRESENTED FOR REVIEW

1. Will a newspaper publishing company be permitted to relocate one block of a busy downtown thoroughfare in the City of Atlanta for the newspapers' private convenience when that privilege has been denied all others, including railroads which are public servants?

2. Will a newspaper company be permitted to take for its private use as a building site 20,000 square feet of a busy and necessary thoroughfare when the courts have universally held that public streets cannot be taken for private uses?

3. Will a trial court be permitted to re-

fuse to grant time for hearing arguments dealing with grave and substantial violations of the U.S. Constitution and to arbitrarily and capriciously hand down a decision ignoring said Constitutional issues?

4. Can a court reporter's loss of all the documentary evidence in a case, delaying an appeal 13 months, deprive the Petitioner of a review of its cause before the State's highest tribunal?

5. Shall both the appellate courts and the trial courts retain dual jurisdiction over appeals after they have been docketed in the appellate court?

6. Shall the Supreme Court of Georgia avoid considering and deciding grave Constitutional questions by merely holding that the instant case is "controlled" by another case dealing with different matters?

7. Can a case be said to "control" another case which was before the appellate Court three months earlier but on which a decision

had been delayed?

8. Will a trial court and an appellate court be condoned in accepting negative, self-contradictory, vague, evasive and equivocal testimony of Defendants as in preference to direct and positive testimony as given by Petitioner?

9. Shall a party be deprived of ingress and egress, unimpeded and unobstructed, to and from its place of business by way of the public streets leading thereto?

10. Does the expenditure of large sums of money justify the Defendants in obstructing public streets with a permanent building?

11. Did the Defendants erect the building in the streets at their peril while injunction proceedings were before the courts?

12. Whether the trial court failed and refused to decide the merits of the case as shown by the evidence and whether this position was sustained and condoned by the Supreme Court of Georgia.

13. Is relief from obstructed streets limited to action by the municipality or abutting landowners?

14. Does a municipality have authority to obstruct streets permanently for private benefit of abutting owners?

15. Do the courts have authority to intervene in the relocation of a public street for private convenience?

CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED AND ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

Cox Enterprises Inc. and its subsidiary Atlanta Newspapers Inc. are building a multistory permanent building at Fairlie Street NW and Wall Street NW in the center of Atlanta.

The building encroaches to the middle line of both streets. In the Case of Fairlie Street the newspaper company has promised to relocate one block of the street eastward 12 feet to relieve the encroachment. The newspaper owns both sides of the street.

In the case of the greatest encroachment, half of 50-foot Hall street for a distance of 810 feet, the encroachment cannot be relieved by relocating the street because the Federal Reserve Bank owns the other side of the street.

The Federal Reserve Bank has announced that it is "cooperating" with the newspaper company in its expansion program. Jack Tarver, president of the two newspaper corporations, was also chairman of the board of the Federal Reserve Bank at the time of the original encroachment.

Southland Incorporated has its place of business on Forsyth Street 50 yards from the encroachment area, its access is obstructed and it has suffered loss of business. Forsyth Street is a two-level street and the portion of the property of Southland Incorporated affected is on the underground level, where Forsyth Street forms a cul-de-sac. Petitioner's only direct access to the underground level is over Fairlie and Hall Streets, which are

encroached and obstructed.

Both streets have been obstructed for two years and are expected to be obstructed by construction several years more. Even after construction is completed, Hall Street, principal access of Petitioner, will be obstructed permanently by the reduction of the width of the street to the width of an alley.

When access of Southland, Incorporated was first obstructed by pouring of concrete foundations, Petitioner sought injunctive relief in Fulton Superior Court, (B-66470) which was denied. Petitioner appealed to the Supreme Court of Georgia where its case was docketed May 12, 1970. (25917)

On May 13, 1970 the trial court heard a motion by Defendants that the appeal of Petitioner at that time in the appellate court be dismissed. The trial court dismissed the motion but passed an order saying the delay in the appeal of Petitioner was caused by Petitioner.

Defendants appealed to the Supreme Court of Georgia from that dismissal. The Supreme Court of

Georgia on October 8, 1970 handed down simultaneous decisions reversing the trial court on the dismissal of the motion to dismiss the appeal and holding that 26026 controlled the original appeal of Petitioner (25917). This had the effect of denying Petitioner a review of the case.

QUESTION NO. 1.

In the case of Coker et al v. Atlanta, K. & N. Ry. Co. 123 Ga 483, 51 SE 481, two merchants in the vicinity (not abutting owners) sought an injunction against the railway company and the City of Atlanta to prevent them from relocating a street for the convenience of the railroad.

The Supreme Court of Georgia, reversing the trial court, gave the plaintiffs the relief they sought and the relocation of the street was denied.

In like circumstances, this same Supreme Court of Georgia has denied Petitioner similar relief in violation of its constitutional rights and has permitted a newspaper company and the City of Atlanta to relocate Fairlie Street NW, a busy

thoroughfare, for the private accommodation of the newspaper company's new building.

To deceive the public the project has been titled a "widening and improvement" project when the actual "widening" is six inches.

The project has destroyed Petitioner's only direct access to the streets of the city for the last two years, and indications are that construction will continue for several years more.

This Court has applied the rule of due process to grade crossings: 98 L ed 62; Atchison T. and S. F. Ry Co. v. Public Utilities Com., 346 U.S. 346; 98 L ed 51; 74 S Ct 92.

QUESTION NO. 2.

In Harbuck v. Richland Box Co. et al 204 Ga. 352 the Supreme Court of Georgia held invalid an ordinance which granted a private firm the exclusive use of a part of a public street.

When Petitioner sought relief in the same court for a similar nuisance it was given quite different treatment and was refused relief.

Petitioner insists that it be given equal treatment in like circumstances, as guaranteed by the Federal Constitution.

There are other instances of like circumstances in which aggrieved persons have been given treatment unlike that given this Petitioner by the same court.

In Rider v. Porter 147 Ga. 760, 95 SE 284 it was held that any permanent structure in a road which materially interfered with travel is a nuisance per se, and that any obstruction permanent in nature or continuously maintained, which interferes with the free use of the road by the public, is a public nuisance and it is immaterial that space may be left on either side of obstruction for the passage of the public. The public have a right to the unobstructed use of the whole road as it was acquired by the county or city.

In Marietta Chair Co. v. Henderson 121 Ga. 399; 407 SE 312; 104 Am St 156; 2 Ann Cas 83 it was held that neither the General Assembly, nor a subordinate public corporation acting under its authority, can

vacate a public street for the benefit of a private person or corporation.

In City Council of Augusta v. Reynolds 122 Ga 754; 50 SE 998; 106 Am St 147, it was said that any permanent structure in a street which materially interferes with travel thereon is a public nuisance, and that the public is entitled to the whole of every street against one who places obstructions therein.

During the trial the City of Atlanta contended that the streets and turning courts belonged to the city and the city could make any use of them that the city desired, and the trial court supported this position and was condoned by the appellate court.

This is a Constitutional issue, as is shown by Arkansas-Louisiana Gas Co. v. Parker Oil Co., which reads:

"Statute authorizing police juries and municipal corporations to revoke and set aside dedications of roads, streets and alleyways, when abandoned or no longer needed for public use, is not invalid as

authorizing the taking of property of dedicator without due process by providing that ownership shall revert to the then present owners of land contiguous to such road, street or alley, SINCE LAND DEDICATED TO PUBLIC USE UNDER STATUTE VESTS THE TITLE TO THE PROPERTY IN THE PUBLIC AS AGAINST THE CONTENTION THAT THE PUBLIC HAD BUT A SERVITUDE on the streets and alleys which on abandonment reverted to the dedicator".

The Supreme Court of Georgia, which in the instant case is permitting a newspaper company to appropriate to its private use 20,000 square feet of a busy thoroughfare, in an early case (Daly V. Georgia S. & F.R. Railroad Co., 80 Ga. 793, 7 SE 146) held that a statute conferring power upon municipal corporations to permit and sanction encroachments on their streets for a reasonable compensation in money did not justify a grant to a railroad company of an extensive portion of a street.

If a railroad, which is a public servant, cannot take over a portion of a street EVEN FOR MONEY, how much less can a newspaper company take over half

of a thoroughfare WITHOUT payment.

Only consideration the newspaper company has given was favorable publicity for a former mayor, Ivan Allen, Jr., to make him appear to be a great mayor. Thus, the mayor of an important city has sold the public's right to use of its streets for a mess of publicity.

The courts which permitted the newspaper company to take over the streets, but refused the same privilege to the railroad, dispensed unequal justice in violation of the Federal Constitution.

No person has the right to use the streets permanently for private purposes. Silverman v. Usen 128 Me 349; 147 A 421; O'Hanlin v. Carter Oil Co. 54 W Va 510. 46 SE 656.

A municipality cannot, under a delegated power to permit an obstruction or encroachment upon its streets or sidewalks, authorize any person so to appropriate a street or sidewalk or any part of it as to exclude the general public from its free and unobstructed use. Acme Realty Co. v. Schinasi 215 NY 495, 109 NE 577; Stillwater v. Lovell, 159

Okla. 214, 15 P 2d 12; Arbenz v. Wheeling and H. R. Co., 33 W Va 1, 10 SE 14.

It is one of the fundamental principles of the common law that no private interference with or purpresture in or upon the public highway will be tolerated. Clawson v. Central Hudson Gas & Elec Corp 298 NY 291; 83 NE 2d 124.

There is general agreement upon the proposition that any permanent, fixed, or stationary object or impediment, as distinguished from a mere temporary obstruction incidental to a lawful use of the way, which unreasonably and unnecessarily interferes with public travel, or which endangers the safety of travelers, constitutes a public nuisance per se. Richardson v. Boston 19 How (US) 263; 16 L ed 639; Birmingham v. Hood McPherson Realty Co. 233 Ala 352, 172 So 114; 108 ALR 1140; Strong v. Sullivan 180 Cal 331, 181 P 59, 4 ALR 343; Michelson v. Dwyer 158 Neb 427, 63 NW 2d 513; Graves v. Shattuck 35 NH 257, Opdycke v. Public Ser. R. Co. 78 NJL 576, 76 A 1032; Stern v. International R Co. 220 NY 284, 115 NE 759, 2 ALR 487; Brooks v. Henrietta Mills Co.

182 NC 719, 110 SE 96; McGowan v. Burns 172 Or 63, 137 P 2d 994; Breisch v. Locust Mountain Coal Co 267 Pa 546, 110 A 242, 9 ALR 1330; Memphis Street R Co v. Rapid Transit Co 133 Tenn 99, 179 SW 635; McFarlane v. Niagara Falls 247 NY 340, 160 NE 391, 57 ALR 1; Dygert v. Schenck 23 Wend (NY) 446, Price v. Travis 149 Va 536, 140 SE 644, 56 ALR 209; Higginbotham v. Kearse, 11 W Va 264, 161 SE 37, 77 ALR 1110.

A building or other similar structure erected on or extending into a street or highway, without legal right or public authorization, or for an unauthorized purpose, is an unlawful obstruction thereof or encroachment thereon, constituting a public nuisance:

First Nat. Bank v. Tyson 133 Ala 459, 32 So 144; Daly v. Georgia S. & F. R. Co 80 Ga 793, 7 SE 146; People ex rel McCormick v. Western Cold Storage Co 287 111 612, 123 NE 43, 11 ALR 437; O'Brien v. Central Iron & Steel Co 158 Ind 218, 63 NE 302; Cowin v. Waterloo 237 Iowa 302, 21 NW 2d 705, 163 ALR 1327; Valparaiso v. Bozarth 153 Ind 536, 28 NE

418; Lewis v. Pingree Nat. Bank 47 Utah 35, 151 P 558; Anger v. Al G. Barnes Amusement Co 183 Wis 272, 197 NW 707.

Limitations or the uses to which a highway may be put have been laid down by this Court in interpreting the 14th Amendment. These limitations have been extended to vehicles for which the highways were designed. The limitations certainly would prohibit a permanent private building as an obstruction in the street.

"The power of Legislature to regulate highways and their use is not exercisable for the purpose of conferring upon a private person a special or exclusive right in use of highways for private gain, but control or conditioning of use of highway by a business must be done as a safety measure", Hertz Drivurself Stations v. Siggins 58 A 2d 464; 359 Penn 25; 7 ALR 2d 438.

"The police power of a State includes everything essential to public safety or health and justifies the destruction or abatement by summary proceedings of whatever may be regarded as a public nuisance."

Aguiar & Bello v. Brock D.C. Cal. 1938; 24 F Supp 692.

The building erected by the Defendants encroaching to the center of two thoroughfares has been shown to be a public nuisance and should be removed.

"Lessee of railroad right of way was not deprived of property without due process by decree abating nuisance and requiring removal of buildings", City of Sturgeon v. Wabash Ry Co 17 SW 2d 616; 223 Mo. App 633.

If a city can abate a nuisance by removing buildings from a railway right of way, much greater is the duty to remove buildings which obstruct a public street as in the instant case. In Petitioner's case officials of the City of Atlanta are in collusion with the Defendant newspapers in the taking of the street for a private building site.

"Destruction of bridge pier illegally encroaching on street does not deny due process", City of Shreveport v. Kansas City, S. & G. Ry. Co., 120 So. 290; 167 La 711.

If a railroad can be compelled to destroy a bridge pier encroaching on a street, a newspaper

company can be required to remove its building from the center line of a street. The railroad decision is based on the 14th Amendment.

So generally accepted under law is the principle that the public streets may not be taken for a private purpose that the West publications in their indexing system have set up a separate heading Key 669 entitled: "Streets may not be permanently used for private purposes".

"...There is no vested right to the use of property in such a manner as to constitute a nuisance, an injury to the public health or morals, or an injury to the property rights of others": Young v. Mall Inv. Co 55 ALR 461; Cowin v. City of Waterloo 163 ALR 1327 ; State v. New England Furniture Co. 52 LRA ns 932; Hathorn v. Natural Carbonic Gas Co. 23 LRA ns 436, 12 Ann Cas 989; Anderson-Prichard Oil Corp. v. Corporation Commission, 342 U.S. 938.

In the instant case the Defendants are using the public street in a private way to constitute a public and private nuisance, an injury to the

safety of the public, and a special injury to the property rights of Petitioner.

40 CJS Highways 218 (3) "Statute authorized boards of supervisors to enact special legislation to protect roads and bridges from encroachment or obstruction or from any improper or exceptionally injurious use is valid": Standard Oil Co v. Commonwealth 109 SE 316; 131 Virginia 830.

"The word 'obstruct' does not necessarily mean render impassable, when used of a public way": Overhouser v. American Cereal Co. 92 NW 74; 118 Iowa 417. In the instant case the Defendants pleaded that the public had plenty of room to pass.

"Public use determines taxing power of States. Exercise of taxing power for merely private purposes is beyond authority of States." Loan Assoc. v. Topeka 20 Wall, 655. On this theory the State has no authority to allow its highways to be used for purely private purposes, as in the instant case.

This Court has held that whether a use is public or private is ultimately a judicial question: Millheim v. Moffat Tunnel Dist. 262 U.S. 710. This

was one of the issues sought to be decided by the trial court and the Supreme Court of Georgia. Both refused to make the decision. There can be little doubt that using a street for the building site of a private plant is a private use.

The taking of a street for a private purpose is a sort of eminent domain in reverse. Under eminent domain Constitutional provisions protect private parties from losing their property to public taking. Under law it much more urgent that the public be protected from private taking of public property as in the instant case.

This Court has prohibited the taking of a street for a private purpose: Chicago, St. Paul M. & O. Ry v. Holmberg 282 U.S. 162.

This Court has decided a case dealing with toll roads: Norfolk Turnpike Co. v. Virginia 225 U.S. 264.

This Court has decided cases dealing with load limits on vehicles using the highways: Sproles v. Binford 286 U.S. 374; and with advertising on trucks: Ry. Express Co. v. New York 336 U.S. 106.

This Court has regulated driver licenses in the premise that any appropriate means to protect other highway users in consonant with due process: Reitz v. Mealey 314 U.S. 33; Kesler v. Dept. of Pub. Safety 369 U.S. 153. Under the same premise it would appear that no person may obstruct a highway and such obstruction may be removed, to protect other highway users.

Police power extends to what is for the greatest welfare of the State. Reduction Co. v. Sanitary Works 199 U.S. 306,318. Police power embraces health, safety and morals.

QUESTION NO. 3

During the hearing of a motion to dismiss Petitioner's appeal in the trial court May 13, 1970 Constitutional questions arose and Petitioner prayed the court to continue the hearing until these grave issues could be researched.

The trial court denied the continuance and terminated the hearing arbitrarily but agreed to withhold judgment a few days to allow briefs.

On May 16, 1970 Petitioner offered its brief dealing with Constitutional questions, principally legality of Ga. Code Section 6-809 (b) which permits a trial court to retain dual jurisdiction in cases docketed in the appellate courts.

This Court is requested to examine this brief and to declare unconstitutional these provisions which have denied Petitioner a review of its cause.

Obviously the trial court did not read the brief, or if it did, the trial court did not give weight to the contentions thereof.

QUESTION NO. 4.

At the close of the trial in the lower court on April 4, 1969, the Court Reporter misplaced all of the documentary evidence (258 pages of exhibits, including affidavits, charts, photographs, plats, etc.) and did not find it until April 24, 1970, nearly 13 months later, thus delaying the preparation and filing of the transcript of the evidence necessary to be transmitted with Petitioner's appeal to the Supreme Court of Georgia. This is

the uncontroverted evidence in the record. Despite this uncontradicted evidence, the lower court, and the Supreme Court of Georgia in deciding Case No. 26026, stated that the delay was inexcusable and was caused by the Plaintiff. (Petitioner) At no time was the Plaintiff in custody or control of the missing evidence, and at no time was care of the evidence the responsibility of the Plaintiff.

When a court reporter "loses" or misplaces all the documentary evidence in a case and thus delays an appeal thirteen months during which the defendants are able to bring to near completion a building which the suit seeks to enjoin it would be a miscarriage of justice to hold that the delay was caused by Petitioner.

Southland, Incorporated, Petitioner, performed all of its responsibilities in the case when it filed timely notice of appeal, ordered the transcript and evidence prepared by the reporter, paid him in advance, paid all costs promptly, diligently sought and obtained proper extensions of time, and filed and transmitted the record, transcript and evidence

to the appellate court within the time allowed by the last extension.

Dereliction of duty and irresponsibility in caring for evidence on the part of court reporters seldom appear in Georgia case law, but we have found the circumstances in the present case duplicated in cases cited in several other jurisdictions. The present case is the only case we have been able to find in any jurisdiction in which a litigant has been denied a review in an appellate court by reason of the negligence of a reporter.

In Indianapolis Life Insurance Co. v. Lundquist, 53 N.E. 2d 338, 222 Ind. 359, it was held:

"9. Official court reporters are an arm of the court, with duty of preserving a record of the evidence, and a failure to make such record available is a failure of the court which entitles injured party to equitable relief.

"11. Where reporter's notes and exhibits were lost beyond recovery through no fault of appealing defendant, and it would be impossible to procure a bill of exceptions without them, defendant was

entitled to a new trial unless parties could agree on bill of exceptions."

"The equal protection clause requires that once a State establishes avenues of appellate review, those avenues be kept free of unreasoned distinctions that can only impede open and equal access to the courts": Am Jr 2d Const. Law 539. Rinaldi v. Yeager, 384 U.S. 305; 86 S Ct. 1497; 16 L ed 2d 577; Williams v. Oklahoma City 395 U.S. 458; 89 S. Ct. 1818; 23 L ed 2d 440; North Carolina v. Pearce 395 U.S. 711; 89 S. Ct. 2072; 23 L ed 2d 656.

When the trial court and the appellate court denied Petitioner a review in the State's highest tribunal supposedly because of a stale appeal, both acted in violation of Ga. Code 2-3705 (Constitutional provision) which reads:

"**No writ of error shall be dismissed because of delay in transmission of the bill of exception and the copy of the record, or either of them, resulting from the default of the clerk or other cause unless it shall appear that the plaintiff in error or his counsel caused such delay**".

The judgment of the Supreme Court of Georgia deprives Plaintiff of its property consisting of its constitutional right of ingress and egress, unimpeded and unobstructed, to and from its place of business by way of the public streets leading thereto, without Due Process of Law and without Equal Protection of the Law in violation of Article I, Section I, Paragraphs I, II, III, IV, and XXIII, and Article VI, Section II, Paragraph IV of the Georgia Constitution; and Amendments V, IV, and X of the U. S. Constitution as applied to the States by Section I of Amendment XIV thereof, by depriving it of the applicable and controlling law applied to other persons and corporations in like circumstances and similar situations, in the foregoing particulars.

The dismissal of Petitioner's appeal by the Supreme Court of Georgia deprived it of its property without due process of law and without equal protection of the law in violation of Article I, Section I, Paragraphs II, III, and IV of the Georgia Constitution and Section I of Amendment XIV of the U. S. Constitution as applied to the States, by depriving

it of its right under the said provisions of the Georgia and U. S. Constitutions to a review of the erroneous judgment of the trial court granted to other persons in like circumstances and similar situations.

"The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them, and to deny access to its courts, in the exercise of its right to regulate practice and procedure, as also subject to restrictions imposed by the contract, full faith and credit, and privileges and immunities clauses of the Federal Constitution": Angel v. Bullington 330 U. S. 183. (Emphasis added)

The principle of separation of powers is violated by Georgia Code Sections which undertake to lay down judicial rules. Administration of resulting dual jurisdiction of the courts has deprived Petitioner of its right to review in the State's highest court.

The Supreme Court of Georgia should be reversed in its affirmation of these statutes.

QUESTION NO. 6.

Petitioner is entitled to a decision on the points raised in its appeal. In the case of Moody and Wife vs. Davis, 10 Ga. 410-411, it was held in part: "The beautiful theory of a trial is this: Both sides are represented by counsel, that their rights may be settled, not by art or chicane or the tricks of the orator, but ACCORDING TO THE LAW. It is therefore the duty of counsel to present to the Court the points which he conceives are in favor of his client; and it is his right to be heard in argument to sustain them; and WHEN PRESENTED, IT IS THE DUTY OF THE COURT TO PASS UPON THEM, IF THEY GROW OUT OF THE CASE * * * If he declines to pass upon a principle thus moved, and it springs out of the case, such declining is error" * *

QUESTION NO. 7.

Judicial decisions may operate precisely like ex post facto laws which are forbidden by Art 1, Sec. 10 of the Federal Constitution, this Court has held in Bouie v. Columbia 387 U.S. 347; 84S. Ct 1647;

12 L ed 2d 894, petitioner contends it is a violation of a well established principle of law and justice as well as a violation of both the Georgia and U. S. Constitutions to apply a law or decision retroactively. Article I, Section III, Paragraph II of the Georgia Constitution expressly provides: "No Bill of Attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grant of special privileges or immunities, shall be passed." (Ga. Code Sec. 2-302). Article I, Section IX, paragraph 3 of the U. S. Constitution provides that "No bill of attainder or ex post facto law shall be passed," (Ga. Code Sec. 2-302). Article I, Section IX, paragraph 3 of the U. S. Constitution provides that "No bill of attainder or ex post facto law shall be passed," and Article I, Section 10 of the U. S. Constitution provides in part: "No State shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." These provisions of the U. S. Constitution are applicable to the States under

Section I of Amendment XIV thereof.

U. S. Constitution, Section 9, Article 1 provides: "No bill of attainder or ex post facto law shall be passed". Similar provision is in Section 10.

The Supreme Court of Georgia violated this provision when it held that the appeal of Petitioner (25917) was controlled by 26026, filed three months later.

"The bill of attainder clause of Article 1 Sec. 9 Clause 3 of the Federal Constitution and the principle of separation of powers do not protect states but only individual persons and private groups", South Carolina v. Katzenbach 383 U.S. 301; 86 S. Ct. 803; 15 L ed 2d 769.

The judgment of the Supreme Court of Georgia that, "This case is controlled by Cox Enterprises, Inc. Et al v. Southland, Incorporated, 226 Ga., (Case No. 26026) this day decided," and "Appeal dismissed," is without foundation in fact or law and unsupported by any authority whatever. Nowhere have we been able to find an instance in which a later case controls an older case. Nowhere have we been

able to find another instance in which the alleged controlling case dealt with matter entirely different from that of the case allegedly controlled.

Case No. 26026 which the appellate court states controls case no. 25917, deals with one subject and one subject only, namely, alleged staleness of appeal. The record in this case, No. 25917, presents voluminous evidence of fact, many questions of law, and questions which must be decided in the public interest and in justice to Plaintiff. None of these matters is even touched upon in the so-called controlling case no. 26026.

The Supreme Court of Georgia in 1866 laid down the ground rules for controlling cases. In Gray vs. Gray, 34 Ga. 499, it held: "A decision of this court WHEN IN POINT, is conclusive authority in SUBSEQUENT CASES." Since that time the appellate court has consistently held in hundreds of cases the facts or the questions propounded must be the same in the controlling case and the case controlled. The decision of the appellate court in case no. 25917 does not meet this test.

In 1911 the Georgia Supreme Court held that former decisions UNDER THE SAME FACTS were controlling. Giddens vs. Lewis, 137 Ga. 22, 72 S.E. 412. The Georgia Court of Appeals has consistently followed the same principle as in Central of Ga. Ry. Co. vs. Hartley, 25 Ga. App. 120, 103 S.E. 262, in which it held that the case controlled NEARLY EVERY PARTICULAR in a suit by another plaintiff growing out of the same transaction.

QUESTION NO. 8.

As to the date the transcript was ordered, the president of the plaintiff corporation testified in an affidavit in the record of this Case, 25917, and again in a separate pleading in Case 26026 as follows:

"On April 8, 1969, four days after the trial, I paid the plaintiff's half of the takedown costs and ORDERED THE TRANSCRIPT prepared for appeal."

This is plain, positive and direct. It is the type of testimony which is given preference in decisions of this Court and by Ga. Code Sec. 38-111.

Direct and positive testimony (such as that

of the plaintiff president) has been given preference to negative, self-contradictory, vague, evasive and equivocal testimony (such as that of the defendants) by Georgia Supreme Court in Southern Railway Co. v. Hobbs, 121 Ga. 428, 49 S.E. 294; and Steele v. Central of Ga. Ry. Co., 123 Ga. 237, 51 S.E. 438.

The same principles have been upheld by the Georgia Court of Appeals in Allison v. Cobb County, 98 Ga. App. 231, 103 S.E. 2nd 195; and Dowling v. Tracy, 116 Ga. App. 43, 156 S.E. 2nd 524.

The court reporter had opportunity in an affidavit and in oral testimony, both recorded in the transcript of the Motion to Dismiss the Appeal to refute and deny directly the aforesaid evidence, but he did not do so. He had opportunity to deny that he had reported the evidence missing for many months. He did not do so.

When examining counsel tried to get something definite on a date from the reporter the answer was:

"A. Probably some time in March. That is JUST A WILD GUESS."

It was on the testimony of a reporter who made WILD GUESSES as to dates that the Plaintiff has been denied a review of its cause when the crucial evidence was a matter of a date.

When questioned on the stand by counsel for the defendants as to who ordered the transcript, and when, the reporter replied:

"A. The best I remember it was Mr. Taylor, and again, the best I remember because I don't have any notes about any specific date, but July, August, or September of last year, 1969."

This was the vague and equivocal evidence which the trial court below, and the appellate court, accepted in preference to the direct and positive statement of the exact date as given by the president of the plaintiff corporation.

On this dubious evidence both courts have concluded that the plaintiff delayed its decision to order the transcript until August, 1969 and that this caused the delay in the appeal.

QUESTION NO. 9.

The trial court held and the appellate court in effect affirmed that only an abutting landowner had rights of ingress and egress that the courts can recognize and protect from obstructions in the street.

It has been held that land does not have to abut at the exact point of the obstruction: Tress v. Pivorotto 133 A 35, 101 Conn 389; Knothe v. Zinzer 115 A 477, 96 Conn 709; Brown v. Roberts 55 SW 2d 9, 246 Ky 316.

It has been held that a landowner may claim special damage from an obstruction even where his land does not abut on the highway, if it is near enough to be materially affected by the obstruction: Madden v. Pennsylvania R Co 21 Ohio Cir Ct. 73, 11 Ohio Cir Dec. 571.

This is precisely the case with Petitioner, whose land is 50 yards east of the obstruction but whose access is destroyed.

QUESTION NO. 10.

"There can be no equal justice when the kind of

trial a man gets depends on the amount of money he has": Smith v. Bennett 365 U.S. 708; 81 S. Ct. 895; 6 L ed 2d 39.

When the Defendants appeared to be influencing the trial court with their argument as to the millions of dollars the defendants had spent, Counsel for Petitioner raised the Constitutional question as shown in the record.

The Supreme Court of Georgia pointed out in support of its decision that during the delay 75 per cent of the construction was completed. The appellate court must have known that the defendants constructed the building at their peril.

The appellate court pointed out in support of its decision that the defendants expended a large financial outlay in constructing the building. We contend that no expenditure, no matter how large, can justify in law or equity the erection of an obstruction in the public streets.

QUESTION NO. 11.

The Defendants pleaded and the Supreme Court

of Georgia stated in support of its decision that the Defendants had expended millions on construction while the injunction proceedings were before the courts.

Petitioner contends that Defendants acted at their peril.

QUESTION NO. 12.

When a street is taken for a private purpose the Constitutional rights of those who use the street are invaded.

Recent decisions which the courts of many states have held that streets cannot be used for private purposes include the following: Cal.--People v. Goodspeed, Super., 192 P.2d 130, 85 Cal. App. 2d Supp. 821 People ex rel. Dept. of Public Works v. Russell, 309 P.2d 10, 48 C.2d 189. C.J.S. cited in Lewis v. Lorenz, 354 P.2d 1008, 1011, 144 Colo. 23. Antenucci v. Hartford Roman Catholic Diocesan Corp., 114 A.2d 216, 142 Conn. 349. Town of Ogden Dunes v. Wildermuth, App., 235 N.E. 2d 73. C.J.S. cited in State v. Hall, App., 351 S.W. 2d 460, 463. State

Dept. of Roads v. Merritt Bros. Sand & Gravel Co., 144 N.W. 2d 180, 180 Neb. 660. Lambe v. Reardon, 173 A.2d 520, 69 N.J. Super. 57. In re Appropriation for Highway Purposes, 215 N.E. 2d 612, 6 Ohio App. 2d 6--Miller v. Berryhill Nursery Co., 218 N.E. 2d 467, 7 Ohio App. 2d 30--In re Appropriation for Hwy. Purposes of Land of Winkelman, 234 N.E. 2d 514, 13 Ohio App.2d 125. William Lauback & Sons v. City of Easton, supra, n. 5. Wolfe v. City of Providence, 74 A. 2d 843, 77 R.I. 192. Abell v. Central Vt. Ry., Inc., 102 A. 2d 847, 118 Vt. 189. Anderson v. Stuarts Draft Water Co., 87 S.E. 2d 756, 197 Va. 36. State ex rel. York v. Board of Com'rs of Walla Walla County, 184 P.2d 577, 28 Wash. 2d 891, 162 A.L.R. 1001.

QUESTION NO. 13.

The trial court held and the appellate court in effect affirmed that only an abutting landowner or a municipality could enjoin the taking of a street for private purposes.

That there is no merit in this argument is

shown by citations elsewhere in this petition in which the courts have acted to protect the public interest.

QUESTION NO. 14.

Under the common law, an obstruction of a street or highway which constitutes a public nuisance is a crime, and may be punished as such:

Costello v. State 108 Ala 45, 18 So 820; State v. Knapp 6 Conn 415; Jacksonville T & K W R Co. v. Thompson 34 Fla 346, 16 So 282; Wragg v. Penn Two 94 111 11; State v. Southern Indiana Gas Co. 169 Ind 124, 81 NE 1149; Huffman V. State 21 Ind App 449, 52 NE 713; State v. Chicago M & St P R Co. 77 Iowa 442, 42 NW 365; Bembe v. Anne Arundel County 94 Md 321, 51 A 179; Commonwealth v. Surridge 265 Mass 425, 164 NE 480, 62 ALR 402, People v. Jackson 7 Mich 432; State v. Kean 69 NH 122, 45 A 256; Flynn v. Taylor 127 NY 596, 28 NE 418; Davis v. New York 14 NY 506; State v. Godwin 145 NC 461, 59 SE. 132; Green v. Thresher 235 Pa 169, 83 A 711; Commonwealth V. Allen 148 Pa 358, 23 A 1115; South Carolina S.B.

Co. v. Wilmington C & A R Co. 46 SC 327, 24 SE 337; State V. Wilkinson 2 Vt 480; State v. Burpee 65 Vt 1, 25 A 964; Teass v. St Albans 38 W Va 1, 17 SE 400; Ralston V. Weston 46 W Va 544, 33 SE 326.

The duty to remove an obstruction rests primarily upon the person or agency who is responsible for its existence. Weed v. Township Committee of Hillsdale 85 A 329.

QUESTION NO. 15.

The trial court held and the appellate court in effect affirmed that only an abutting landowner or the municipality could interfere with the relocation or private taking of a street.

The unreasonableness of this contention appears in the present cause where the newspaper company owns both sides of Fairlie Street NW and under the trial court's ruling it has only to obtain collusion of city officials before relocating or even taking for its own use the entire street.

The Defendants have reduced 50-foot-wide Wall Street NW to an alley, see photos, because they

have collusion of city officials and the opposite side of the street is owned by the Federal Reserve Bank, whose chairman at the time of encroachment was also president of the two defendant newspaper corporations.

In situations like this the courts are the only protection which the public has. The courts must intervene despite the decisions of the trial court and the appellate court that they cannot.

Fortunately for citizens of Atlanta the courts in the past have intervened as shown elsewhere in this petition and have preserved the public's rights in the streets.

CORPORATIONS ENJOY PROTECTION OF CONSTITUTIONAL PROVISIONS

The due process clause protects stockholders of a corporation, it has been held in Iowa-Illinois Gas & Elec. Co. v. City of Ft. Dodge 85 NW 2d 28; 248 Iowa 1201, which reads: "Freedom is invaded when property rights are ignored, and this is true when property confiscated is owned by stockholders through a corporation as well as when it is an

individual's home, his livestock, or the tools by which he earns his living; and thus it cannot be accurately said that the Constitution no longer protects property".

"Legislation must apply equally to all corporations in like circumstances", Knoxville & O. Ry Co. v. Harris 99 Tenn 684; 42 SW 115.

There is no doubt that a corporation may not be deprived of its property without due process of law. Smyth v. Ames 169 U.S. 466,522,526; Kentucky Co v. Paramount Exch 262 U.S. 544,550; Liggett Co. v. Baldridge 278 U.S. 105.

This Court has held that although a corporation is the creation of a State which reserves the power to amend or repeal corporate charters, the retention of such power will not support the taking of the corporate property without due process of law. Southwestern Tel. Co. v. Danaher 238 U.S. 482.

The equal protection clause applies to corporations. Santa Clara Co. v. Southern Pacific R.R. 118 U.S. 394.

CONCLUSION

Petitioner contends that the foregoing petition shows that it has been deprived of its property without due process of law and without equal protection of the law by the said decisions of the Georgia Supreme Court in violation of Section I of Amendment XIV of the U. S. Constitution in the many particulars specified, and that the federal constitutional questions raised are substantial and involve matters of grave public concern demanding the grant of the writ of certiorari by this honorable court.

WHEREFORE, Petitioner urges that it is entitled as a matter of absolute Constitutional right under the pertinent sections of the United States Constitution cited herein to the grant of the writ of certiorari to the Supreme Court of Georgia and reversal of its arbitrary, capricious and unconstitutional decisions denying it said constitutional rights.

Respectfully submitted,

G. Seals Aiken
Attorney for Petitioner
Suite 1409-10 Candler Building
Atlanta, Georgia 30303

ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged and copy received of foregoing petition for certiorari.

This January _____, 1971.

Counsel for Cox Enterprises, Inc.
and Atlanta Newspapers, Inc.

21. Safety of Public----------16
18,20,21,23,39
22. Separation of Powers---------- 5
29,32
23. Taxing Power----------21
24. Title to Streets----------13
14
25. Vested Rights----------20
Corporations----------43
Petition for Certiorari---------- 1
Prayer----------45
Questions Presented for Review---------- 4
Statement of Case and Argument---------- 7
Statement of Grounds---------- 3

CASES CITED

Page
Abell v Central Vt Ry Inc 102 A 2d 847, 118 Vt 189----------40
Acme Realty Co v Schinasi 215 NY 495, 109 NE 577----------15
Aguiar & Bello v Brock 24 F Supp 692----------19
Anderson-Prichard Oil Corp v Corp Comm 342 US 938----------20
Allison v Cobb County 98 Ga App 231, 103 SE 2d 195----------35
Anderson v Stuarts Draft Water Co 87 SE 2 756, 197 Va 36----------40
Angel v Bullington 330 US 183----------29
Anger v Al G Barnes Amuse Co 183 Wis 272, 197 NW 707----------18
Antenicci v Hartford Rom Cath Dio Corp 114 A 2d 216, 142 Conn 349----------39
In ReAppro for Hghwy Purposes Land of Winkelman 234 NE 2d 514, 13 Ohio App 2d 125----------40
In re Appro. for Highway Purp 215 NE 2d 612, 6 Ohio App 2d 6----------40
Arbenz v Wheeling & H R Co 33 W Va 1, 10 SE 14----------16
Atchison T & S F Rv Co v Pub Util Comm

363 US 346, 98 L ed 51, 74 S Ct 92----------11
Bembe v Anne Arundel County 94 Md 321, 51 A 179----------41
Birmingham v Hood McPherson Rlty Co 233 Ala 352, 172 So 114, 108 ALR 1140----------16
Bouie v Columbia 387 US 347, 84 S Ct 1647, 12 L ed 2d 894----------30
Breisch v Locust Mtn Coal Co 267 Pa 546, 110 A 242, 9 ALR 1330----------17
Brooks v Henrietta Mills Co 182 NC 719, 110 SE 96----------16
Brown v Roberts 55 SW 2d 9, 246 Ky 316----------37
Cen of Ga Ry Co v Hartley 25 Ga App 120, 103 SE 262----------34
Chicago St M & O Ry v Holmberg 282 US 162----------22
City Council of Augusta v Reynolds 122 Ga 754, 50 SE 998, 106 Am St 147----------13
City of Shreveport v Kansas City S & G Ry Co 120 So 290, 167 La 711----------19
City of Sturgeon v Wabask Ry Co 17 SW 2d 616, 223 Mo App 633----------19
CLawson v Cent Hudson Gas & Elec Corp 298 NY 291, 83 NE 2d 124----------16
Coker et al v Atlanta K & M Ry Co 123 Ga 483, 51 SE 481----------10
Commonwealth v Allen 148 Pa 358, 23 A 1115----------41
Commonwealth v Surridge 265 Mass 425, 164 NE 480, 62 ALR 402----------41
Costello v State 108 Ala 45, 18 So 820----------41
Cowin v City of Waterloo 163 ALR 1327----------20
Daly v Ga S & F Ry Co 80 Ga 793, 7 SE 146----------17
Davis v New York 14 NY 506----------41
ex rel Dept Pub Wks v Russell 309 P 2d 10 48 C 2d 189----------39
Dowling v Tracy 116 Ga App 43, 156 SE 2d 524----------35
Dygert v Schenck 23 Wend NY 446,----------17
First Nat Bk v Tyson 133 Ala 459, 32 So 144----------17
Flynn v Taylor 127 NY 596, 28 NE 418----------41

Gidden v Lewis 137 Ga 22, 72 SE 412----------34
Graves v Shattuck 35 NH 257----------16
Gray v Gray 34 Ga 499----------33
Green v Thresher 135 Pa 169, 83 A 711----------41
Harbuch v Richland Box Co et al 204 Ga 352-------11
Hathorn v Natural Carbonic Gas Co 23
LRA ns 436, 12 Ann Cas 989----------20
Hertx Drivurself Stns v Siggins 58 A 2d
464, 359 Penn 25, 7 ALR 2d 707----------18
Higginbotham v Kearse 11 W Va 264, 161
SE 37, 77 ALR 1110----------17
Huffman v State 21 Ind App 449, 52 NE 713--------41
Indianapolis Life Ins Co v Lundquist 53
NE 2d 338, 222, Ind 359----------26
Iowa-Illinois Gas & Elec Co v City of
Ft Dodge 85 NW 2d 28 248 Iowa 1201----------43
Jacksoville T & K W R Co v Thompson
34 Fla 346; 16 So 282----------41
Kentucky Co v Paramount Exch 262 US 544, 550-----44
Knothe v Zihzer 115 A 477, 96 Conn 709----------37
Kesler v Dept Pub Safety 369 US 153----------23
Knoxville and O. Ry. Co v Harris
99 Tenn 684; 42 SW 115----------44
Lambe v Reardon 172 A 2d 520, 69 NJ Super
57----------40
Lewis v Lorenz 354 P 2d 1008, 1011,
144 Colo 23----------39
Lewis v Pingree Nat Bk 47 Utah 35, 151 P
558----------18
Liggett Co v Baldridge 278 US 105----------44
Loan Asso v Topeka 20 Wall 655----------21
Madden v Penn Ry Co 21 Ohio C Ct 73,
11 Ohio C Dec 571----------37
Marietta Chair Co v Henderson 121 Ga
399 407 SE 312, 104 Am St 156, 2 Ann
Cas 83----------12
McFarlane v Niagara Falls 247 NY 340,
160 NE 391, 57 ALR 1----------17
McGowan v Burns 172 Or 63, 137 P2d 994----------17
Memphis Street R Co v Rapid Transit Co
133 Tenn 99, 179 SW 635----------17
Michelson v Dwyer 158 Neb 427, 63 NW
2d 513----------16

Miller v Berryhill Nursery Co 218 NE 2d 467, 7 Ohio App, 2d 30----------40
Millheim v Moffat Tunnel Dist 262 US 710---------21
Moody & Wife v Davis 10 Ga 410----------30
Norfolk Turnpike Co v Virginia 225 US 264--------22
No Car v Pearce 395 US 711, 89 S Ct 2072, 23 L ed 2d 656----------27
O'Brien v Central Iron & Steel Co 158 Ind 218, 63 NE 302----------17
O'Hanlin v Carter Oil Co 54 W Va 510, 46 SE 656----------15
Opdycke v Pub Ser R Co 78 NJL 576, 76 A 1032----------16
Overhouser v Am er Cereal Co 92 NW 74, 118 Iowa 417----------21
People v Goodspeed 192 P 2d 130, 85 Cal App 2d Supp 821----------39
People v Jackson 7 Mich 432----------41
People ex rel McCormick v Western Cold Sto Co 123 NE 43, 11 ALR 437----------17
Price v Travis 149 Ba 536, 140 SE 644, 77 ALR 1110----------17
Railway Exp Co v New York 336 US 106----------22
Ralston v Weston 46 W Va 544, 33 SE 326----------42
Reduction Co v Sanitary Wks 199 US 306, 318------23
Reitz v Mealey 314 US 33----------23
Richardson v Boston 19 How (US) 263, 16 L ed 639----------16
Rider v Porter 147 Ga 760, 95 SE 284----------12
Rinaldi v Yeager 384 US 305, 86 S Ct 1497 16L ed 2d 577----------27
Santa Clara Co v Southern Pacific RR 118 US 394----------44
Silverman v Usen 128 Me 349, 147 A 421----------15
Smith v Bennett 365 US 708, 81 S Ct 895, 6 L ed 2d 39----------38
Smyth v Ames 169 US 466, 522, 526----------44
So Car v Katzenbach 383 US 301, 86 S Ct 803, 15 L ed 2d 769----------32
South Carolina S B Co v Wilmington C A R Co 46 SC 327, 24 SE 337----------41
So Ry Co v Hobbs 121 Ga 428, 49 Se 294----------35
Southwestern Tel Co v Danaher 238 US 482---------44

Sproles v Binford 286 US 374----------22
Standard Oil Co v Commonwealth 109 SE 316, 131 Va 830----------21
State v Burpee 65 Vt L 25 A 964----------42
State v Chicago M & St P R Co 77 Iowa 442 42 NW 365----------41
State v Hall 351 SW 2d 460, 463----------39
State v Godwin 145 NC 461, 59 SE 132----------41
State v Kean 69 NH 122, 45 A 256----------41
State v Knapp 6 Conn 415----------41
State v New Eng Furn. Co 52 LRA ns 932----------20
State v So Ind Gas Co 169 Ind 124, 81 NE 1149----------41
State v Wilkinson 2 Vt 80----------42
State ex rel York v Bd of Comm Walla Walla County 184 P 2d 577, 28 Wash 2d 891 162 ALR 1001----------40
State Dept Roads v Merritt Bro Sand & Gravel Co 144 NW 2d 180, 180 Neb 660----------39
Steele v Cen of Ga Ry Co 123 Ga 237, 51 SE 438----------35
Stern v Int, R Co 220 NY 284, 115 NE 759, 2 ALR 487----------16
Stillwater v Lovell 159 Okla 214, 15 P 2d 12----------15
Strong v Sullivan 180 Cal 331, 181 P 59, 4 ALR 343----------16
Teass v St Albans 38 W Va 1, 17SE 400----------42
Town of Ogden Dunes v Wildermuth 235 NE 2d 73----------39
Tress v Pivorotto 133 A 135, 101 Conn 389--------37
Valparaiso v Bozarth 153 Ind 536, 28 NE 418------17
Weed v Township Committee of Hillsdale 85 A 329----------42
William v Oklahoma City 395 US 458, 89 S Ct 1818, 23 L ed 2d 440----------27
Wm Lauback & Sons v City of Easton supra n. 5----------40
Wolfe v City of Providence 74 A 2d 843, 77 R 1 192----------40
Wragg v Penn Tw 94 Illinois----------41
Young v Mall Inv Co 55 ALR 461----------20

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 16 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1251

SOUTHLAND INCORPORATED,
Petitioner,

versus

COX ENTERPRISES, INC. and ATLANTA NEWSPAPERS, INC., ET AL.,
Respondents.

BRIEF FOR RESPONDENTS COX ENTERPRISES, INC. AND ATLANTA NEWSPAPERS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALLEN POST
3300 First National Bank Tower
Atlanta, Georgia 30303
Counsel for Respondents,
Cox Enterprises, Inc., and
Atlanta Newspapers, Inc.

Of Counsel:

Albert G. Norman, Jr.
Charles T. Zink
HANSELL, POST, BRANDON & DORSEY
3300 First National Bank Tower
Atlanta, Georgia 30303

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. The Supreme Court of Georgia Decided an Issue of Georgia Law in Accordance with the Applicable Law of the State and There Is No Contention to the Contrary in the Petition for Certiorari.	8
II. No Question of Federal Law Was Involved in Either Decision of the Supreme Court of Georgia.	9
III. The Alleged Reasons for Granting the Writ Stated in the Petition for Certiorari Are Totally Insufficient to Call for Review by this Court.	11
IV. Although the Supreme Court of Georgia Correctly Decided the Cases on the Grounds Stated in its Opinions, the Decisions were Correct on Several Independent Grounds, without Regard to the Question Sought to be Raised by the Petition for Certiorari.	14
A. Plaintiff was guilty of such laches in prosecuting its appeal to require dismissal by the Supreme Court of Georgia.	14

TABLE OF CONTENTS (Continued)

Page

B. The appeal was properly dismissable on the ground that the questions presented had been rendered moot. 15

CONCLUSION 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Cases:

Allen v. Georgia, 166 U.S. 138 (1897) 13

Bailey v. Anderson, 326 U.S. 203 (1945) 10

Baldwin v. Traveling Men's Ass'n, 283 U.S. 522 (1931) 13

Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326 (1913) 11

Davison v. City of Summerville, 204 Ga. 748, 51 S.E.2d 820 (1949) 15

Draper v. State of Washington, 372 U.S. 487 (1963) 13

Ferguson v. Georgia, 365 U.S. 570 (1961) 10

George v. American Credit Counsel, Inc., 222 Ga. 512, 150 S.E.2d 683 (1966) 14

Griffin v. People of Illinois, 351 U.S. 12 (1956) 13

James v. Appel, 192 U.S. 129 (1904) 13

Kidd v. Manning, 223 Ga. 755, 158 S.E.2d 375 (1967) 10

Law v. State, 219 Ga. 583, 134 S.E.2d 776 (1964) 10

McKane v. Durston, 153 U.S. 684 (1894) 13

Newman v. Smith, 217 Ga. 465, 123 S.E.2d 305 (1961) 15

Page

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 10

Rinaldi v. Yeager, 384 U.S. 305 (1966) 12

Sav-A-Stop, Inc. v. Rich, 224 Ga. 354, 162 S.E.2d 318 (1968) 15

Seaboard Airline Ry. Co. v. Greenfield, 160 Ga. 407, 128 S.E. 430 (1925) 5

Sutton v. Barry, 233 F.2d 220 (6th Cir., 1956) 14

Standard Oil Co. v. Missouri, 224 U.S. 270 (1912) 13

Street v. New York, 394 U.S. 576 (1969) 9

Tracy v. Ginzberg, 205 U.S. 170 (1907) 13

Trimble v. Commissioners of Roads & Revenues of Troup County, 167 Ga. 52, 144 S.E. 771 (1928) 15

Tucker Products Corp. v. Helms, 171 F.2d 126 (9th Cir., 1949), cert. den. 336 U.S. 938 (1949) 12

Williams v. Georgia, 349 U.S. 375 (1955) 10

Statutes:

28 U.S.C. §1257(3) 11

Ga. L. 1965, pp. 18, 29, as amended, Ga. L. 1968, pp. 1072, 1074 (Ga. Code Ann. §6-809(b)) 2, 6, 8

Miscellaneous:

Federal Rules of Appellate Procedure, Rule 12(c) 12

United States Supreme Court Rules, Rule 19(1)(b) 11

United States Supreme Court Rules, Rule 23(f) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1251

SOUTHLAND INCORPORATED,
Petitioner,

versus

COX ENTERPRISES, INC. and ATLANTA NEWSPAPERS, INC., ET AL.,
Respondents.

BRIEF FOR RESPONDENTS COX ENTERPRISES, INC. AND ATLANTA NEWSPAPERS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are appended to this Brief (Appendices I, II), and are reported at 226 Ga. 794, 177 S.E. 2d 653, and 226 Ga. 798, 177 S.E. 2d 655.

JURISDICTION

No federal question was timely and properly raised below so as to give this Court jurisdiction to review the judgments below on writ of certiorari.

QUESTIONS PRESENTED

I. Whether a writ of certiorari should be granted where the petitioner alleges that review should be had because of a right, privilege or immunity set up or claimed under the Constitution, but where the petition for certiorari fails to show that any constitutional issue was properly raised in the courts below or passed upon by such courts?

II. If the petitioner had shown that it was entitled to review in this Court by certiorari (which plainly was not done), the questions presented would be:

(a) Whether a state statute which provides for the dismissal of appeals where there has been an inexcusable delay in the filing of the transcript caused by the appellant violates any federally protected right.

(b) Whether the application of such statute to the facts of this case where, among other things, the petitioner had inexcusably caused a delay of some thirteen months in the filing of the transcript, violates any such right.

STATUTES INVOLVED

Section 2 of the Appellate Practice Act (Ga. L. 1965, pp. 18, 29, as amended; Ga. Code Ann. §6-809(b)) provides in pertinent part as follows:

> "No appeal shall be dismissed by the appellate court nor consideration of any error therein refused because of failure of any party to cause the transcript of evidence and proceedings to be filed within the time allowed by law or order of court, but the trial court may, after notice and opportunity for hearing,

order that the appeal be dismissed where there has been an unreasonable delay in the filing of such transcript and it is shown that the delay was inexcusable and caused by such party; and in like manner, the trial court may order the appeal dismissed where there has been an unreasonable delay in the transmission of the record to the appellate court, and it is seen that such delay was inexcusable and was caused by the failure of a party to pay costs in the trial court or file pauper's affidavit."

STATEMENT OF THE CASE

These respondents deem that the following statement of the case is necessary to correct inaccuracies and omissions in the statement of the petitioner. The petitioner ("plaintiff") filed suit for injunction in the Superior Court of Fulton County, Georgia against respondents Cox Enterprises, Inc., Batson-Cook Company, and the City of Atlanta ("defendants"). Respondent Atlanta Newspapers, Inc., whose stock is owned by Cox Enterprises, Inc., was allowed to intervene as an additional defendant by consent of the parties. In its complaint, the plaintiff alleged that the defendants had poured the foundations for a building, obstructing two alleged streets, "Wall Street" and Fairlie Street. The defendants filed answers which denied the material allegations of the complaint and set forth various affirmative defenses.

After a hearing which commenced on March 28, 1969, the trial court granted summary judgment in favor of all of the defendants on April 4, 1969.

Plaintiff filed a Notice of Appeal with respect to such orders on May 1, 1969, and thereafter obtained orders

extending the time "in which to prepare the said record. . . ." The transcript of evidence and proceedings was not filed with the clerk of the trial court until May 7, 1970—almost thirteen months later. On May 8, 1970, these defendants filed a motion in the trial court to dismiss plaintiff's appeal on the ground that there had been an unreasonable delay in the filing of the transcript and such delay was inexcusable and caused by the plaintiff. After a hearing on the motion, the trial judge entered an order dated May 20, 1970, in which he found that "the delay in filing the transcript in this case was unreasonable, and inexcusable and that this delay was caused by the appellant's failure to decide to order the transcript as a whole until the Fall of 1969." The order, however, continued as follows:

> "This Court, however, recognizes the danger inherent in any statute which permits a trial court to dismiss an appeal of its own rulings. In view of this and the fact that movants failed to object to the orders of extension previously entered, as well as the fact that said case has now been docketed in the Supreme Court and assigned for argument, this Court denies the motion to dismiss the appeal."

These defendants filed a Notice of Appeal to the Supreme Court of Georgia on June 5, 1970, which in Case No. 26026 reversed the trial court and held that it should have dismissed the appeal by plaintiff. The Supreme Court of Georgia in Case No. 25917 dismissed the appeal of plaintiff, since that case was controlled by the decision in Case No. 26026. Both of these decisions of the Georgia Supreme Court are appended at the end of this Brief (Appendices I, II).

Although the merits of the injunction proceeding were

not considered by the Supreme Court of Georgia, and hence are not directly involved in the petition before this Court, a brief synopsis of the entire case follows. Atlanta Newspapers, Inc. was in the process of constructing a new building, with Batson-Cook Company as the contractor. Part of the building was constructed on the southernmost twenty-five feet of Seaboard Yard (sometimes called "Upper Wall Street") and part of the building upon property that was deeded to Atlanta Newspapers, Inc. by the City of Atlanta in exchange for other real property. Plaintiff occupies a portion of premises located on another street more than a block away from the construction area. These premises do not abut the construction area and are accessible by alternate routes, some of which do not lead near the construction area. At the hearing on the original complaint, Atlanta Newspapers, Inc. showed that it was the successor in interest to Seaboard Airline Railroad Company to the southernmost twenty-five foot area of "Upper Wall Street", and showed by documents and other evidence that Seaboard had owned the fee interest in that property. See *Seaboard Air-line Ry. Co. v. Greenfield*, 160 Ga. 407, 128 S.E. 430 (1925). Defendants further showed that all permanent construction occurred in said southernmost twenty-five foot area, and that the area was not a public street or highway. The defendants showed that pursuant to charter authority granted by the state legislature, the Mayor and Board of Aldermen of the City of Atlanta had authorized an exchange of real estate with Atlanta Newspapers, Inc. that would result in the widening of Fairlie Street and be advantageous to the City of Atlanta; that an exchange was made pursuant to such authority; and that construction of the building was taking place only in the portion

of what formerly was Fairlie Street that had been deeded to Atlanta Newspapers, Inc. pursuant to such authority. Further, defendants showed that public announcement had been made of the proposed construction on June 23, 1968, and that during the period from that date until the suit was brought (March 18, 1969), Atlanta Newspapers, Inc. had spent approximately $2,200,000.00 in the construction of the building. It was shown that the defendants had the proper building permits and the permission of the City of Atlanta to construct the building. After a hearing which continued over several days, and at which numerous documents, photographs, and affidavits were considered, as well as oral testimony, the trial court granted summary judgment to the defendants and dismissed the action.

The plaintiff appealed from the judgment of the trial court, and at this point the circumstances directly pertinent to the petition before this Court commenced. Although the plaintiff had filed a Notice of Appeal on May 1, 1969, the appeal still had not been perfected one year thereafter, and the defendants moved the trial court to dismiss the appeal pursuant to Section 2 of the Appellate Practice Act (Ga. L. 1965, pp. 18, 29, as amended; Ga. Code Ann. §6-809(b)), asserting that there was an unreasonable and inexcusable delay in the filing of the transcript and that the delay was caused by the plaintiff. Subsequent to the filing of this motion, but before the hearing, the appeal was docketed in the Supreme Court of Georgia. At the hearing before the trial court on the motion, defendants showed that thirteen months had elapsed between the judgment of the trial court and the filing of the transcript on May 7, 1970; and showed that plaintiff did not order any type of transcript until August

or September, 1969, when the objections to evidence were explained; that the entire transcript was not ordered until November, 1969; that the documentary evidence was not requested until April 1970, and that approximately $12,000,000.00 had been expended by the defendants on construction during this period of delay. The trial court found that the delay in filing the transcript was unreasonable and inexcusable and caused by the plaintiff but denied the motion of defendants on the ground that the appeal had been docketed in the Supreme Court of Georgia. These defendants appealed to the Supreme Court of Georgia from this latter ruling, and in this appeal the Supreme Court of Georgia reversed the trial court and ordered the trial court to dismiss the appeal taken by the plaintiff.

SUMMARY OF ARGUMENT

I. The Supreme Court of Georgia decided an issue of Georgia law in accordance with the applicable law of the state and there is no contention to the contrary in the petition for certiorari.

II. No question of federal law was involved in either decision of the Supreme Court of Georgia.

III. The alleged reasons for granting the writ stated in the petition for certiorari are totally insufficient to call for review by this Court.

IV. Although the Supreme Court of Georgia correctly decided the cases on the grounds stated in its opinions, the decisions were correct on several independent grounds, without regard to the question sought to be raised by the petition for certiorari.

ARGUMENT

I.

The Supreme Court of Georgia Decided an Issue of Georgia Law in Accordance with the Applicable Law of the State and There Is No Contention to the Contrary in the Petition for Certiorari.

The Supreme Court of Georgia decided a question of state law in accordance with the applicable law of the state. Section 2 of the Appellate Practice Act (Ga. L. 1965, pp. 18, 29, as amended; Ga. Code Ann. §6-809(b)), provides in pertinent part as follows:

> ". . . the trial court may, after notice and opportunity for hearing, order that the appeal be dismissed where there has been an unreasonable delay in the filing of such transcript and it is shown that the delay was inexcusable and caused by such party; . . . ."

Since the trial court in this case had specifically found that the delay in filing the transcript was unreasonable, inexcusable and caused by the plaintiff, the Supreme Court of Georgia held that, pursuant to the statute quoted above, the appeal of plaintiff should have been dismissed. As can be seen from the petition in this case, plaintiff is attempting to relitigate in this Court issues relating to the merits of the injunction proceeding which were allegedly involved in the dismissed appeal. The issue decided by the Supreme Court of Georgia related solely to state appellate procedure, and involved only the question of whether a thirteen-month delay in perfecting an appeal should cause such appeal to be dis-

missed under applicable state law. Although the plaintiff quarrels with the findings of the trial court relative to the cause of the delay in the filing of the transcript, plaintiff does not contend in its petition for certiorari that the Supreme Court of Georgia improperly applied the Georgia statute in question to such factual findings.

II.

No Question of Federal Law Was Involved in Either Decision of the Supreme Court of Georgia.

Plaintiff did not make any constitutional attack at the trial level upon the validity of the Georgia statute applied by the Supreme Court of Georgia (Ga. Code Ann. §6-809(b)), nor with respect to its application under the circumstances of this case. Because such questions were not raised, no court below passed on such questions. For this reason, plaintiff was unable to comply, and did not comply with Rule 23(f) of this Court, which requires the petitioner to specifically set out the stage in the proceedings at which and the manner in which the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

The Court has held that when the highest state court has failed to pass upon the federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, and that if it was not presented to state courts in such manner that it was necessarily decided by the highest state court, this Court would have no power to consider the issue. *Street v. New York*, 394 U. S. 576, 582 (1969).

A petitioner must follow the state procedures in rais-

ing the federal question, and failure to do so proves fatal for review in this Court. See *Ferguson v. Georgia*, 365 U. S. 570, 572 (1961). When required by state practice, the federal question must be raised before the trial court, and it must be presented to the trial court at the appropriate time and in the appropriate manner. "A state procedural rule which forbids the raising of federal questions at late stages of the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power." *Williams v. Georgia*, 349 U. S. 375, 382-83 (1955). The Georgia appellate courts will not consider a constitutional attack made for the first time on appeal, and not properly raised below. *Kohl v. Manning*, 223 Ga. 755, 158 S.E. 2d 375 (1967); and *Law v. State*, 219 Ga. 383, 134 S.E. 2d 776 (1964), where the court stated: "Where it is sought to invoke a ruling by the Supreme Court on a constitutional question, the question must have been raised in the trial court and a ruling made thereon and the case brought to the Supreme Court for review." If reasonable state procedural requirements are not observed, this Court will decline to exercise jurisdiction. And when the highest state court is completely silent on the federal question, this Court will assume, unless it is affirmatively shown otherwise, that the silence is due to the procedural deficiency. See *Bailey v. Anderson*, 326 U. S. 203, 206-7 (1945). Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient unless the court actually entertains the petition and expressly decides the question. See, e.g., *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 128 (1945). To be considered a reviewable judgment under such circumstances, the order denying the peti-

tion for rehearing must be more than a cursory statement that the petition has been fully or materially considered and accordingly is denied. See *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U. S. 326, 333-34 (1913).

III.

The Alleged Reasons for Granting the Writ Stated in the Petition for Certiorari Are Totally Insufficient to Call for Review by This Court.

Plaintiff (on page 3 of its petition) asserts that it seeks a writ of certiorari under the provision of 28 U.S.C. §1257(3) which permits review by certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." It also alleges that this Court should issue the writ since the Georgia courts have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This latter basis for a writ, however, relates only to federal courts of appeals. See Rule 19(1)(b) of this Court.

Plaintiff has not set up any title, right, privilege or immunity under the Constitution. As stated above, at no point below did plaintiff properly raise a constitutional question, and no court below passed upon any constitutional question or other question of federal law. Had the plaintiff properly raised such issues, however, the judgments below would not be subject to constitutional attack.

All systems of appellate procedure with which we are familiar require the appellant to exercise some degree of diligence in perfecting an appeal. Indeed one of the aims of our legal system is that litigation should be concluded

with at least minimal promptness. The instant case furnishes an excellent example. The trial court in its judgment had determined that the defendants were entitled to proceed with the construction of their building. During the thirteen months that elapsed before plaintiff caused the transcript to be filed, the defendants had completed all construction of the building except for certain finish items. It would have been grossly unfair to permit the plaintiff to delay until that point to obtain review of the trial court's decision.

The Georgia procedure under which plaintiff's appeal was dismissed is in no way unique. For example, Rule 12(c) of the Federal Rules of Appellate Procedure provides for the dismissal of an appeal where the appellant has failed to cause timely transmission of the record. See, e.g., *Tucker Products Corp. v. Helms*, 171 F.2d 126 (9th Cir., 1949), cert. den. 336 U. S. 938 (1949).

Defendants do not dispute the rule set out in *Rinaldi v. Yeager*, 384 U. S. 305 (1966), where this Court stated at page 310:

> "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

There is no showing whatsoever that any one comparably situated with the plaintiff has been treated differently. In applying the Georgia statute which provides for dismissal when the appellant inexcusably causes an unreasonable delay in perfecting the appeal, the Supreme Court of Georgia was not discriminating against the

plaintiff. This is not a case, for example, where an appellant was refused an appeal because of indigency. Cf. *Griffin v. People of Illinois*, 351 U. S. 12 (1956); *Draper v. State of Washington*, 372 U. S. 487 (1963). Here, the appellant *inexcusably* delayed the perfection of its own appeal for thirteen months. Cf. *Griffin v. People of Illinois, supra*, at page 16: "There is no contention that petitioners were dilatory in their efforts to get appellate review. . . ." The Georgia statute applies to all persons of every class who would appeal to the appellate courts of the state.

Although the petition is not entirely clear, it appears that petitioner contends that it has a constitutional right to an appeal which is not subject to state-created conditions. It has been recognized many times by this Court that no such right exists. See, *e.g.*, *McKane v. Durston*, 153 U. S. 684 (1894); *James v. Appel*, 192 U. S. 129, 137 (1904); *Standard Oil Co. v. Missouri*, 224 U. S. 270, 286 (1912); *Baldwin v. Traveling Men's Ass'n*, 283 U. S. 522, 524 (1931).

Plaintiff lost its case at the trial level and waited thirteen months before perfecting its appeal. It is attempting to relitigate the merits of its complaint in this case by alleging constitutional infirmity in the state appellate procedure. It is settled that the Fourteenth Amendment has not transformed this Court into a court of general review to which questions of general justice or equitable considerations arising out of the alleged takings of property may be brought for final determination. *Tracy v. Ginzberg*, 205 U. S. 170 (1907); *Allen v. Georgia*, 166 U. S. 138, 140 (1897). Contrary to the protestations in the petition, the fact that one loses his case does not show

a denial of equal protection of the laws. See *Sexton v. Barry*, 233 F.2d 220 (6th Cir., 1956), cert. den. 352 U. S. 870 (1956).

IV.

Although the Supreme Court of Georgia Correctly Decided the Cases on the Grounds Stated in Its Opinions, the Decisions Were Correct on Several Independent Grounds, Without Regard to the Question Sought to be Raised by the Petition for Certiorari.

A. *Plaintiff was guilty of such laches in prosecuting its appeal to require dismissal by the Supreme Court of Georgia.*

Plaintiff waited thirteen months before perfecting its appeal. In *George v. American Credit Control, Inc.*, 222 Ga. 512, 150 S.E. 2d 683 (1966), the appeal was dismissed where a failure to pay costs caused a delay of seventy days, the court stating at page 513: "[j]ustice delayed is often justice denied. This court seeks to uphold the laws and expedite its hearings and to make certain the administration of justice without delay. We must continue to conform to this practice. . . . This court will not consider this appeal which represents a stale one caused by the laches of the appellant, and it is dismissed under the authority of the Constitution (Code Ann. §2-3705), the laws and past decisions and Rule 8 of this court."

If a delay of seventy days causes an appeal to be stale, and if the appellant in such circumstances is guilty of laches, then certainly the plaintiff in this case was guilty

of laches where it delayed perfecting its appeal for more than one year.

B. *The appeal was properly dismissable on the ground that the questions presented had been rendered moot.*

Ga. Code Ann. §6-809(b) provides that appeals shall be dismissed where the questions presented have become moot. The complaint filed by the plaintiff sought to enjoin the construction of a certain building by the defendants. Defendants submitted with their motion to dismiss the appeal in the Supreme Court, an affidavit of Mr. Donald L. Davis, Project Manager for the defendant Batson-Cook Company, stating that the building had been completed, and all construction in the area of the two alleged streets had been accomplished. This was also shown in the affidavit of Mr. William I. Ray, Jr., similarly submitted. Where the act sought to be enjoined has been completed by the time the appeal is perfected, the Georgia courts will dismiss the appeal on the ground of mootness. See *Newman v. Smith*, 217 Ga. 465, 123 S.E. 2d 305 (1961); *Sav-A-Stop, Inc. v. Rich*, 224 Ga. 354, 162 S.E. 2d 318 (1968); *Trimble v. Commissioners of Roads & Revenues of Troup County*, 167 Ga. 52, 144 S.E. 771 (1928); *Davison v. City of Summerville*, 204 Ga. 748, 51 S.E. 2d 820 (1949).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

ALLEN POST
Counsel for Respondents, Cox Enterprises, Inc. and Atlanta Newspapers, Inc.

Of Counsel:

Albert G. Norman, Jr.
Charles T. Zink

HANSELL, POST, BRANDON & DORSEY
3300 First National Bank Tower
Atlanta, Georgia 30303

February 15, 1971

CERTIFICATE OF SERVICE

The undersigned attorney for these Respondents hereby certifies that copies of the foregoing Brief for Respondents Cox Enterprises, Inc. and Atlanta Newspapers, Inc. in Opposition to Petition for Certiorari have been served upon counsel of record for the Petitioner and for the remaining Respondents by depositing the same in a United States mail box, with first class postage prepaid, respectively addressed to such counsel of record at their post office addresses, as follows:

G. Seals Aiken, Esq.
1409-10 Candler Building
Atlanta, Georgia 30303
Attorney for Petitioner, Southland, Incorporated

Henry L. Bowden and
Martin McFarland, Esqs.
William-Oliver Building
Atlanta, Georgia 30303
Attorneys for Respondent, City of Atlanta

J. L. Glover, Esq.
Glover and Davis
Post Office Drawer 1038
Newnan, Georgia 30263
Attorney for Respondent, Batson-Cook Company

This 13 day of February, 1971.

Allen Post

ALLEN POST
Counsel for Respondents,
Cox Enterprises, Inc. and
Atlanta Newspapers, Inc.

APPENDIX I

26026. COX ENTERPRISES, INC. et al. v. SOUTHLAND, INC.

The trial court should have dismissed the appeal in *Southland, Inc. v. Cox Enterprises, Inc.*, 226 Ga. 798, because of the unreasonable delay in filing the transcript of evidence and proceedings.

ARGUED SEPTEMBER 17, 1970—DECIDED OCTOBER 8, 1970—REHEARING DENIED OCTOBER 22, 1970.

Injunction. Fulton Superior Court. Before Judge McKenzie.

Hansell, Post, Brandon & Dorsey, Allen Post, Albert G. Norman, Jr., Charles T. Zink, for appellants.

G. Seals Aiken, F. L. Breen, Henry L. Bowden, Martin McFarland, Glover & Davis, J. L. Glover, for appellee.

GRICE, Justice. For decision here is whether an appeal should have been dismissed upon the ground of unreasonable and inexcusable delay in the filing of the transcript of evidence and proceedings.

This issue arose after the grant of summary judgments for the defendants in an action filed in the Superior Court of Fulton County by Southland, Inc., against Cox Enterprises, Inc., the City of Atlanta, and Batson-Cook Co., seeking injunctive relief against continuance of an alleged obstruction of two streets by construction of a multi-story building. Atlanta Newspapers, Inc., was later named as a defendant.

Upon grant of the summary judgments, the plaintiff on May 1, 1969, filed a notice of appeal.

On May 8, 1970, before the appeal had been docketed

in this court, two of the defendants filed in the trial court their motion to dismiss the appeal. The motion was based upon Section 2 of the Appellate Practice Act (Ga. L. 1965, pp. 18, 29, as amended; *Code Ann.* §6-809(b)) and asserted that there was an unreasonable and inexcusable delay in the filing of the transcript and that the delay was caused by the plaintiff. The motion alleged that 13 months had elapsed between the judgments of the trial court and the filing of the transcript on May 7, 1970, and that during that time the defendants had expended large sums of money in constructing the building.

The trial court on May 20, 1970, after the appeal had been docketed in this court on May 12, 1970 (Case No. 25917), entered an order on the motion to dismiss, in which it found that "the delay in filing the transcript in this case was unreasonable and inexcusable and that this delay was caused by the . . . [plaintiff's] failure to decide to order the transcript as a whole until the fall of 1969."

This order further recited: "This court, however, recognizes the danger inherent in any statute which permits a trial court to dismiss an appeal of its own rulings. In view of this and the fact that movants failed to object to the order of extensions previously granted as well as the fact that said case has now been docketed in the Supreme Court and assigned for argument, this court denies the motion to dismiss the appeal.

"However, it is ordered that a transcript be made of this proceeding and this supplemental transcript be forwarded to the Supreme Court of Georgia as a part of the record in this case for determination as to whether or not the appeal should be dismissed."

This appeal is from that judgment, which was certified for immediate review.

1. The evidence adduced before the trial court on the motions to dismiss the appeal, while in conflict, amply supported such finding of delay caused by the plaintiff.

The court reporter testified that it was not until August or September, 1969, that the plaintiff, or anyone on its behalf, ordered any kind of transcript; that in August or September of 1969, the plaintiff's president requested that the reporter type the objections to the evidence, and they were delivered to him in early October; that it was not until November 10, 1969, that the plaintiff's president ordered a transcript of all of the evidence and proceedings; and on December 11, 1969, such transcript was delivered to plaintiff's attorney; and that in late April or early May 1970, the plaintiff's president requested the reporter to obtain the original documentary evidence, and it was delivered to him that same day.

The project manager of the defendant contractor testified that between the date of the original hearing in the case and the hearing on the motion to dismiss, 75% of the construction had been completed, leaving only the finish items.

The vice president of the defendant Atlanta Newspapers, Inc., testified as to the large financial outlay for the building during each of the 12 months that had ensued since the filing of the notice of appeal.

2. The trial court having found that the delay in filing the transcript was unreasonable, inexcusable and caused by the plaintiff and such finding being supported by the evidence upon the hearing, it should have dismissed the appeal.

Since that court did not enter a dismissal, this court will do so.

As we appraise the salient factors, the lapse of time from the notice of appeal on May 1, 1969, to the filing of the transcript on May 7, 1970, under the circumstances referred to above, constitutes a stale appeal.

Although a 1968 amendment (Ga. L. 1968, p. 1072; *Code Ann.* §6-809(b)) to the Appellate Practice Act provides that the trial courts, rather than the appellate courts, may dismiss appeals for failure of a party to file the transcript within the proper time, this court has held that such amendment does not change the responsibility of this court under the Constitution (Art. VI, Sec. II, Par. V; *Code Ann.* §2-3705), and that this court will dismiss a stale appeal. See in this connection, *Fahrig v. Garrett*, 224 Ga. 817 (165 SE 2d 126).

(a) Furthermore, under the circumstances shown here dismissal cannot be avoided because of the successive extensions which the plaintiff obtained from judges of the trial court.

There is nothing in our statutes or decisions which requires that the obtaining of extensions per se excuses an appellant from the consequences of his own unreasonable delay.

This court in *Rogers v. McDonald*, 226 Ga. 329 (175 S.E. 2d 25) recognized that the obtaining of extensions is not conclusive on the issue of delay by the appellant in filing the transcript. In that case several successive extensions had been granted and the appellee sought to have the trial court set aside the extensions as an abuse of judicial discretion under the facts appearing there. The trial court conducted a hearing at which full evidence

was presented on the issue as to unreasonable delay and found that under the facts there was no cause to set aside the extensions. This court affirmed, stating that *it was not shown that the appellant was in any way responsible* for the length of time being taken by the reporter to prepare the transcript.

(b) The fact that the defendants did not object to the grant of the extensions does not bar them from moving to dismiss the appeal.

Each of the extensions presented to the trial judge for his approval recited that an additional number of days "will be required in which to prepare the record on appeal. . . ."

There is nothing which shows that the defendants knew that notwithstanding the plaintiff's claim that additional time was required, any such need was due to his own delay in ordering the transcript. Under the Appellate Practice Act (Ga. L. 1965, pp. 18, 21; *Code Ann.* §6-804) the grant of such extensions may be ex parte.

For the foregoing reasons the judgment in the instant case is

Reversed. All the Justices concur.

APPENDIX II

25917. SOUTHLAND, INC. v. COX ENTERPRISES, INC. et al.

GRICE, Justice. This case is controlled by *Cox Enterprises, Inc. v. Southland, Inc.*, 226 Ga. 794.

Appeal dismissed. All the Justices concur.

ARGUED JULY 15, 1970—DECIDED OCTOBER 8, 1970—REHEARING DENIED OCTOBER 22, 1970.

Injunction. Fulton Superior Court. Before Judge McKenzie.

G. Seals Aiken, F. L. Breen, for appellant.

Allen Post, Charles T. Zink, Albert G. Norman, Jr., William G. Grant, Henry L. Bowden, Martin McFarland, J. L. Glover, for appellees.

SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAR 16 1971
G. ROBERT SEAVER

SUPREME COURT OF THE UNITED STATES

October term, 1970

No. 1 2 5 1

SOUTHLAND INCORPORATED
Petitioner in Certiorari

v.

COX ENTERPRISES INC. AND ATLANTA NEWSPAPERS INC.
Respondents in Certiorari

REPLY BRIEF OF PETITIONER SOUTHLAND INCORPORATED IN REBUTTAL OF BRIEF OF RESPONDENTS COX ENTERPRISES INC. AND ATLANTA NEWSPAPERS INC. AND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

G. Seals Aiken
Attorney for Petitioner
1409-10 Candler Building
Atlanta, Georgia 30303

TABLE OF CONTENTS

Opinions below----------1
Jurisdiction----------2
Rebuttal of Questions Presented----------2
Rebuttal of Summary of Argument----------4
Rebuttal of Argument----------5
Conclusion----------28
Certificate of Service----------28

AUTHORITIES

Baldwin v Traveling Men's Assn 283 US 522--------21
Davison v City of Summerville 204 Ga 748---------23
McKane v Durston 153 US 684----------20
Tracy v Ginzburg 205 US 170----------20
Newman v Smith 217 Ga 475----------22
Radio Station WOW Inc v Johnson 326 US 120-------19
Sav-A-Stop Inc v Rich 224 Ga 354----------22
Seaboard Air Line Ry Co v Greenfield 160 Ga 407, 128 SE 430----------24
Sexton v Barry 233 F 2d 220----------21
Smith v Bennett 365 US 708, 81 S Ct 895, 6 L ed 2d 39----------11
Street v New York 394 US 576----------19
Trimble v Connors 167 Ga 52----------23
Williams v Georgia 349 US 375----------18

SUPREME COURT OF THE UNITED STATES

October term, 1970

No. 251

SOUTHLAND INCORPORATED
Petitioner in Certiorari

v.

COX ENTERPRISES INC AND ATLANTA NEWSPAPERS INC.
Respondents in Certiorari

REPLY BRIEF OF PETITIONER SOUTHLAND INCORPORATED IN REBUTTAL OF BRIEF OF RESPONDENTS COX ENTERPRISES INC. AND ATLANTA NEWSPAPERS INC. AND IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below and the orders of the trial court are included in Petitioner's Appendix in a separate volume and opinions of the appellate court are reported at 226 Ga. 794, 177 SE 2d 653; and 226 Ga. 798, 177 SE 2d 655.

JURISDICTION

Federal Constitutional questions were timely and properly raised in the trial court and repeated and insisted upon in the Supreme Court of Georgia.

REBUTTAL OF QUESTIONS PRESENTED

I. The petition shows (verified by the record) that Federal questions were timely and properly raised in the trial court and repeated and insisted upon in the Supreme Court of Georgia.

Petitioner listed 110 errors in its enumeration of errors, many of them Federal Constitutional Questions. Some of them were formally designated as Federal Constitutional questions.

II. Respondents have incorrectly presented the issues.

(a) The question here is whether dual jurisdiction over appeals after docketing in the higher court is Constitutional where such dual jurisdiction deprives petitioner of its Constitutional right to a review before the state's highest tribunal, and es-

pecially where the uncontroverted evidence is that the delay in filing of the transcript was caused by the negligence of the official reporter of the trial court when he "lost" all the documentary evidence and especially where the judgment of the trial court that the delay was caused by petitioner was arbitrary and capricious and deprived petitioner of its property without due process of law in violation of Section I of Amendment XIV of the U. S. Constitution.

RESPONDENTS OFFERED MANY UNFOUNDED EXPLANATIONS FOR THE DELAY IN THE APPEAL, ALL OF THEM INTENDED TO BLAME PETITIONER UNJUSTLY FOR THE DELAY

(b) The question here is whether a court reporter's "loss" of the evidence can be said to be caused by petitioner when the petitioner had no custody or control over the evidence and had nothing to gain by such a loss, whereas respondents were given sufficient time to complete the building sought to be enjoined and were arbitrarily and capriciously given an excuse justifying respondents in continuing con-

struction of the building and an excuse to claim the delay in the appeal was caused by petitioner.

REBUTTAL OF SUMMARY OF ARGUMENT

I. The petition is replete from end to end with contention that the Supreme Court of Georgia decided not a single issue of law, but evaded the issues by erroneously and unconstitutionally holding that the appeal was "stale".

II. The petition lists 25 principles of Constitutional law, some of them multiple subjects, all based on the Federal Constitution which this honorable Court knows is the supreme federal law, on which petitioner relies for allowance of writ of certiorari.

III. The reasons for granting the Writ of Certiorari are impelling and require a review by this Court according to its prior decisions cited by petitioner.

IV. (A) Respondents refer to "the question" sought to be raised. The petition enumerates not "the question", but 15 questions of Constitutional

Federal law, all of which are supported by argument and authorities, which petitioner presents for review.

(B) Since it made no decision on mootness, it may be assumed that the Supreme Court of Georgia agreed with petitioner that an obstruction in a street cannot become moot.

REBUTTAL OF ARGUMENT

I.

THE SUPREME COURT OF GEORGIA DECIDED NO SINGLE ISSUE OF GEORGIA LAW, BUT EVADED ALL ISSUES, INCLUDING CONSTITUTIONAL ISSUES, BY THE ILLEGAL AND UNCONSTITUTIONAL DEVICE OF HOLDING THAT A LATER CASE "CONTROLLED"

GEORGIA SUPREME COURT DELAYED DECISION ON PETITIONER'S APPEAL THREE MONTHS UNTIL RESPONDENTS FILED THEIR COUNTER APPEAL, THEN QUICKLY DECIDED THE COUNTER APPEAL CONTROLLED THE EARLIER APPEAL IN VIOLATION OF EQUAL JUSTICE AND RETROACTIVE LAW PROVISIONS.

It was impossible for counsel for petitioner to anticipate that the Supreme Court of Georgia would withhold decision on its appeal for three months

during which respondents could file their counter appeal and be given a decision illegally and unconstitutionally holding that the latter appeal controlled the earlier appeal in violation of federal Constitutional provisions forbidding retroactive law and unequal treatment under the law.

Constitutional provisions on retroactive law are discussed in petitioner's Appendix page 15.

For authorities on controlling cases see Appendix of petitioner Pages 12, 13, 14.

RESPONDENTS REMAINED SILENT FOR 12 MONTHS UNTIL THE MISSING EVIDENCE WAS FOUND, THEN RAISED THE ISSUE OF A "STALE" APPEAL

It was impossible for counsel for petitioner to anticipate that the Supreme Court of Georgia would uphold respondents in their contention that they had not waived any right to contend that the appeal was not filed timely by waiting approximately twelve months before raising such an issue despite the fact that petitioner secured several extensions

of time with notice each time to respondents in which to file the transcript on appeal in its effort to have the trial court's official reporter locate the necessary documentary evidence in his custody and control and no objections whatever were made by respondents to any of said orders of extension.

See trial court's observation on this point in petitioner's Appendix top page 41. Extension orders: petitioner's Appendix pages 37, 38.

FINDING OF A "STALE" APPEAL WAS BASED ON SELF-CONTRADICTORY, EQUIVOCAL AND EVASIVE TESTIMONY OF THE TRIAL COURT'S REPORTER, TESTIMONY SUCH AS GEORGIA LAW FROWNS UPON

The findings of the trial court and of the appellate court that the appeal of petitioner was "stale" were based solely on the self-contradictory, vague and equivocal testimony of the official reporter of the trial court (R22,23) in which the reporter finally admitted under cross examination that he "misplaced" all the documentary evidence and did not "find" it

until a year later, three weeks before the appeal was docketed in the Supreme Court of Georgia.

The reporter testified that he "found" the evidence (258 pages) in a cabinet in an anteroom of the trial court.

The reporter's "loss" of the evidence conveniently gave the respondents the time they needed to complete construction of the building which it was sought to enjoin and a convenient excuse to raise the issue of a "stale" appeal.

When such actions deprive petitioner of its Constitutional right to review in the state's highest tribunal, this Court is impelled to correct the situation.

Direct and positive testimony such as that offered by petitioner (R45 Paragraphs 3, 4) is given preference by Ga. Code 38-111 over vague, self-contradictory, evasive and equivocal testimony such as that of the trial court's official reporter. (R22,23)

II.

FEDERAL CONSTITUTIONAL QUESTIONS WERE TIMELY, PROPERLY AND FORMALLY RAISED AND INSISTED UPON IN THE TRIAL COURT AND ON APPEAL IN THE SUPREME COURT OF GEORGIA

While more than 25 violations of the Federal Constitution in the trial court and the appellate court are alleged by petitioner, its principal injuries are:

1. It has been deprived of its Constitutional right to a review by the state's highest court.

2. It has been deprived of principal access to its place of business over the public streets without due process.

Federal Constitutional questions raised timely and properly in the trial court were of two types: (1) those raised formally and designated as constitutional questions; and (2) those raised informally and not specifically labeled as constitutional questions.

Principal question formally raised in the trial

court was that of dual jurisdiction of Georgia courts where this dual jurisdiction deprived petitioner of its constitutional right to a review of its case in the state's highest tribunal.

At R26 paragraph 2 counsel for petitioner is shown arguing that there are grave constitutional questions involved. He was overruled by the trial court.

At R31 counsel for petitioner pleads for the trial court to allow one week for study and consideration of the constitutional questions involved.

TRIAL COURT HAD NO TIME FOR CONSTITUTIONAL DEBATE

The trial court (bottom of R31) announced it would withhold decision a few days to permit presentation of briefs, but would allow no time for constitutional debate.

Whereupon petitioner presented its brief (R33,43) within the time allowed and orally urged upon the court that any judgment holding that the delay in the appeal was caused by plaintiff would

be in spite of uncontroverted evidence that the plaintiff was in no way responsible for the delay and would deprive plaintiff of its property without due process and would deprive it of equal treatment under the law.

TRIAL COURT REFUSED PETITIONER OPPORTUNITY TO ARGUE CONSTITUTIONAL QUESTIONS

The trial court's decision (petitioner's appendix, page 40) was in effect a denial of petitioner's constitutional plea.

If the trial court read petitioner's brief, it obviously gave the brief (R33,43) no weight.

At R27 counsel for petitioner raised informally the constitutional question of equal justice, when the trial court appeared to be impressed by testimony that the respondents were spending $1,000,000 per month.

Pertinent to this question is a holding of this Court in Smith v. Bennett 365 US 708; 81 S. Ct 895; 6 L ed 2d 39:

"There can be no equal justice when the kind of trial a man gets depends on the amount of money he has".

Petitioner prays that this Court will rule not only on the Constitutional questions formally raised but also on those raised informally. Petitioner also prays this Court will rule on the violations of the Federal Constitution as shown in the judgments of the Supreme Court of Georgia.

In some instances in which the trial court committed Constitutional errors in its judgments and orders, first opportunity given petitioner to raise the federal question was in its enumeration of errors. In each case petitioner raised the question and insisted upon a ruling.

However, the Supreme Court of Georgia evaded decision on these questions by the illegal and unconstitutional device of holding that a later case controlled.

III.

CONSTITUTIONAL QUESTIONS HERE PRESENTED ARE SO UNUSUAL AND OF SUCH EXTRAORDINARY PUBLIC IMPORT THAT THEY DEMAND CONSIDERATION BY THIS COURT.

This Court in recent months has commendably strengthened the Constitutional provisions for free speech and a free press. However, we do not believe this Court is ready to hold that the theory of free press entitles a newspaper to take over the public streets for its private use to the exclusion of the public.

During the injunction hearing before the trial court on April 4, 1969 counsel for petitioner warned the court that if it persisted in its contention that abutting property owners had greater rights in the public streets than did the public the court would be in violation of federal constitutional provisions that the interest of the public in the streets overrides the interest of abutting owners.

In the same hearing counsel for petitioner urged vigorously that a judgment adverse to peti-

tioner would deprive petitioner without due process of its property in the form of unimpeded access to its place of business over the public streets and would be in violation of Article I Section I Paragraphs II, III, IV, XXIII, and Section III Paragraph I of the Georgia Constitution, and Section I of the Fourteenth Amendment of the U. S. Constitution.

JUDGMENT OF TRIAL COURT IS CAPRICIOUS AND ARBITRARY

However, at the conclusion of the hearing the trial court did capriciously and arbitrarily hand down judgments and orders dismissing petitioner's complaint and giving as a reason the fact that petitioner was not an abutting landowner. (Petitioner's appendix Pages 34,35,36). See in this connection Error No. 110 (R71).

At the conclusion of a motion hearing in the trial court May 13, 1970 counsel for petitioner insisted vigorously to the trial court that any ruling or judgment the court might reach which

would deprive petitioner of a review in the appellate courts would be in violation of Article I Section I Paragraphs II, III, IV, XXIII, and Section III Paragraph I of the Georgia Constitution and Section I of the Fourteenth Amendment of the U. S. Constitution.

RESPONDENTS AND THE GEORGIA COURTS SAID PETITIONER CAUSED THE DELAY IN APPEAL WHEN THE REPORTER "LOST" ALL THE DOCUMENTARY EVIDENCE CAUSING DELAY, AND "FOUND" IT MORE THAN A YEAR LATER: THIS IS UNCONTROVERTED EVIDENCE.

Counsel for petitioner argued before the trial court that any judgment of the trial court holding that the delay in filing the transcript was caused by petitioner would be contrary to direct, positive and uncontroverted evidence before the court and would deprive petitioner of its property without due process and without equal protection of the law granted to persons and to parties litigant in like circumstances and similar situations in violation of Article I Section I Paragraphs I, II,

III, IV, XXIII and XXV of the Georgia Constitution and Section I of the Amendment Fourteen of the U. S. Constitution. See in this connection Error No. 110 (R71).

Thereafter on May 20, 1970 the trial court rendered a judgment (petitioner's appendix, page 40) holding that the delay in filing the appeal was caused by petitioner, the judgment being based entirely on the equivocal, vague and self-contradictory testimony of the trial court's reporter and giving no weight to direct and positive testimony of the president of the petitioner.

This judgment of the trial court influenced the Supreme Court of Georgia to hold that petitioner's appeal was stale, thus denying petitioner a review in the state's highest tribunal. See in this connection Error No. 110 (R71)

THE TRIAL COURT'S OFFICIAL REPORTER FINALLY ADMITTED THAT HE FOUND THE MISSING EVIDENCE A YEAR AFTER THE TRIAL IN A CABINET IN THE PREMISES OF THE TRIAL COURT

The trial court's official reporter "misplaced"

all the documentary evidence (258 pages) at the close of the trial April 4, 1969 and did not find it until April 24, 1970, three weeks before the appeal was docketed in the Supreme Court of Georgia, thus delaying petitioner's appeal. See reporter's testimony and admissions at R22,23.

Evidence that neither the plaintiff nor its counsel was guilty of any delay or negligence in filing the transcript is at R24,25.

For additional facts on the nature of the official court reporter's testimony see petitioner's Appendix pages 17,18,19,20.

For authorities dealing with responsibilities of court reporters see petitioner's Appendix pages 26, 27, 28, 29, 30.

FEDERAL QUESTIONS RAISED

All of the Federal Constitutional questions raised in the trial court were raised and insisted upon in the Supreme Court of Georgia in petitioner's enumeration of errors, (R51,72) brief and argument,

and motions for rehearing. (Petitioner's Appendix Pages 9-31).

In a motion before the trial court May 13, 1970 petitioner argued the constitutional issue that the trial court had lost jurisdiction of the case because it already was docketed in the Supreme Court of Georgia. (Petitioner's appendix Pages 39,40).

The trial court thereafter arbitrarily dismissed petitioner's motion. (Petitioner's appendix Page 40).

RESPONDENTS' CASES CITED SUPPORT POSITION OF PETITIONER

Although petitioner raised ample Federal questions in trial court to justify jurisdiction of this Court, where obvious and flagrant violations of the Constitution appear in record this Court has considered such questions whether or not they had been formally raised in the trial court.

Respondents have cited and rely on several such cases. One of these is Williams v. Georgia 349 US 375 from an Atlanta trial court. The petitioner in that case did not raise a Constitutional question

until he applied for new trial in an extraordinary motion before the Georgia Supreme Court. But this Court accepted the case on certiorari.

In another case cited and relied on by respondents, Radio Station WOW Inc. v. Johnson 326 US 120, when the question of jurisdiction arose this Court held: "Federal question duly made below and we must consider it".

In another case cited and relied on by respondents, Street v. New York 394 US 576 the defendant had no stronger case as to jurisdiction than this petitioner, but his case was considered.

This Court's observation at the time was "Defendant was engaged in Constitutionally protected activity".

A motion in the trial court and raising of a Federal issue in two appellate courts was held sufficient to give this Court jurisdiction in that case.

In the case at bar petitioner presented a motion on Constitutional questions in the trial

court and insisted on the question before the Georgia Supreme Court. (R26,31,71)

Brief on Constitutional questions presented to the trial court by petitioner is in the record at R33,44.

RESPONDENTS OVERLOOK CONSTITUTIONAL LIMITATIONS IN THEIR AUTHORITIES

In their attempt to negate petitioner's right to an appeal, respondents have cited McKane v. Durston 153 US 684. McKane does say: "An appeal to a higher court from a judgment of conviction is not a matter of absolute right", but there follows this qualification applicable to the case at bar: "INDEPENDENTLY OF CONSTITUTIONAL PROVISIONS".

Thus McKane supports position of petitioner which is relying on Constitutional provisions.

In citing Tracy v. Ginzburg 205 US 170 to support their contention that "the Fourteenth Amendment did not impair a state's rights to take property", respondents overlooked the all-important qualification "WHEN THEY DO NOT INVOLVE ANY RIGHT SECURED

BY THE FEDERAL CONSTITUTION".

Petitioner relies on its property rights as secured by the Federal Constitution.

Respondents cite Baldwin v. Traveling Men's Association 283 US 522. The ruling in this authority is limited strictly to Federal courts. Baldwin points out, however, that the full faith and credit clause applies only to state courts.

Baldwin does not support any contention of respondents.

Sexton v. Barry 233 F 2d 220, cited by respondents, was a suit to enjoin a state supreme court from a pending proceeding. It has no application to the case at bar.

IV.

MOOTNESS AUTHORITIES CITED BY RESPONDENTS HAVE NO APPLICATION TO CASE AT BAR

Respondents had counted so heavily on mootness for their counter appeal that, although the Supreme Court of Georgia ignored the question, respondents are still arguing it in the presentation before this

Court.

When the court reporter "lost" the evidence they were given a convenient excuse to rush their building to completion and cry "moot".

Petitioner contends that their mootness argument now is itself moot.

It may be assumed that the Georgia Supreme Court agreed with the contention of petitioner that an obstruction in a street can never become moot, but may be removed by injunctive procedure at any time.

THE RESPONDENTS CONTEND THAT ONLY ABUTTING PROPERTY OWNERS CAN INTERVENE IN A CASE INVOLVING AN OBSTRUCTION IN THE STREET, AND THE GEORGIA SUPREME COURT IN EFFECT AFFIRMED IT CONTRARY TO LAW

Not one of the cases on mootness cited by respondents deals with an obstruction in a street, and therefore all their authorities are distinguished.

In Newman v. Smith 217 Ga. 475 the building sought to be enjoined was on private land.

In Sav-a-Stop Inc. v. Rich 224 Ga. 354 a con-

tractual relationship between the parties had terminated.

Trimble v. Connors 167 Ga. 52 deals with a highway being constructed across complainant's land.

Davison v. City of Summerville 204 Ga. 748 deals with a sewer line injunction.

Neither of those cases is applicable to the case at bar.

THE RESPONDENTS' NEW BUILDING ENCROACHES TO THE CENTER LINE OF WALL STREET FOR DISTANCE OF 810 FEET AND THE RESPONDENTS ADMIT IT

The new mechanical building of Atlanta Newspapers Inc. takes in half of Wall Street NW for a distance of 810 feet as found by the Fulton County surveyor in his survey and affidavit. (R1,2,3 and 4) This is real estate worth $1,000,000 on the present market.

Respondents admit the encroachment in their Brief (Page 5 Lines 6 and 23.) They prefer to call Wall Street "Seaboard Yard".

THE ENCROACHED AREA WAS USED BY THE PUBLIC AS A STREET FOR 75 YEARS, AND RESPONDENTS DO NOT DENY IT

This is a 25-foot strip to which a railroad, previous owner, had been given special privileges (loading zone for a freight depot and site for sidetracks) special privileges which were specifically limited to such uses as would not exclude the public.

The restrictions are spelled out in Seaboard Air Line Railway Co. v. Greenfield 160 Ga 407; 128 SE 430 on which respondents rely. This was a proceeding seeking to enjoin laying of sidetracks in the disputed area.

Petitioner insists that the special privileges granted for use as a common carrier do not justify a newspaper company in excluding the public and constructing a building on the disputed strip.

ALL ABUTTING OWNERS IN GEORGIA HAVE FEE TO HALF THE STREET BUT THEY ARE NOT PERMITTED TO OBSTRUCT THE STREET

Petitioner does not dispute that respondents own a fee interest in the site. Georgia law pro-

vides that the abutting owner has fee interest to half the street nearest him, but this does not permit the abutting owner to obstruct the street.

Despite the survey and affidavit of the Fulton County surveyor and despite their own photographs (R5) showing an original 50-foot street, respondents still claim that the encroachment is "not on a public street or highway". This claim, of course, is inconsistent with their admission that they have built on half of Seaboard Yard "sometimes called Upper Wall Street NW". (Respondents' Brief Page 5, Lines 6 and 23)

Respondents describe Wall Street NW and Fairlie Street NW as "alleged" streets. While their own photographs negate the implications of such "allegation", petitioner cites Greenfield (ante) for a description of Wall Street NW, then known as Seaboard Driveway, in which the Georgia Supreme Court held it was "one of the busiest highways in the City of Atlanta". (1925)

PENCIL-MARKED AFFIDAVIT IN RECORD SHOWS UNEQUAL TREATMENT BY TRIAL COURT

Petitioner cites as an example of unequal treatment under law by the trial court the Supplemental Affidavit of Boyd E. Taylor (R10,20).

The pencil marks on the document are the manuscript writing of the trial court.

No evidence offered by the respondents was thus mutilated by the trial court. In fact, not one single item of evidence of the respondents was stricken.

Petitioner contends that the trial court's rulings as shown by this affidavit violated nearly every constitutional right of petitioner including free speech.

Attention of the Court is called to two photographic exhibits of respondents (R5). The upper photograph (Exhibit C) shows Wall Street as it appeared for 75 years preceding the present construction. At right is the Seaboard freight depot. In connection with its common carrier activities the courts permitted the railroad special privileges in the street for loading docks and sidetracks AS LONG AS

THE PUBLIC WAS NOT EXCLUDED. Respondents have stretched these special privileges and argue they have a right to exclude the public and erect a permanent building on the disputed strip.

OBSTRUCTING BUILDING REDUCES 80-FOOT STREET TO WIDTH OF AN ALLEY

By sighting the depot building line toward the structure in the background the encroachment appears obvious. A few feet of the excavated area was backfilled when construction was completed, but the finished project left half the street taken permanently, an outrageous obstruction in the street. Hall Street now appears to be an alley.

Plaintiff's photographic exhibits (#6,7,8,9) bear captions which are self explanatory. They relate to the Fairlie Street relocation, which petitioner contends is unconstitutional, in that it is a public street being relocated for private convenience, to fit the building plans of respondents.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ for certiorari should be allowed.

Respectfully submitted,

G. Seals Aiken
Attorney for Petitioner
1400-10 Candler Building
Atlanta, Ga. 30303

CERTIFICATE OF SERVICE

The undersigned attorney for Petitioner hereby certifies that at least three copies of the foregoing Reply Brief of Petitioner Southland Incorporated in rebuttal of the Brief of Respondents Cox Enterprises Inc., and Atlanta Newspapers Inc., in support of Petitioner's Petition for Writ of Certiorari have been served upon Counsel of Record for all the Respondents by depositing the same in a United States mail box, with first class postage prepaid, respectively addressed to such Counsel of Record at their post office addresses, as follows:

Allen Post, Esq.
3300 First National Bank Tower
Atlanta, Georgia 30303
Counsel for Atlanta Newspapers
and Cox Enterprises Inc., Respondents

Henry L. Bowden and
Martin McFarland Esqs.
William-Oliver Building
Atlanta, Georgia 30303
Attorneys for Respondent City of Atlanta

J. L. Glover Esq.
Glover and Davis
Post Office Drawer 1038
Newnan, Georgia 30263
Attorney for Respondent Batson-Cook Co.

This _____ day of March, 1971

G. Seals Aiken
Counsel for Petitioner
Southland Incorporated

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 30 1971
E. ROBERT SEAVER, CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1251

SOUTHLAND INCORPORATED
Petitioner in Certiorari

v.

CGR ENTERPRISES INC. AND ATLANTA NEWSPAPERS INC.
Respondents in Certiorari

PETITION FOR REHEARING OF SOUTHLAND INCORPORATED

C. Smith Atkins
Attorney for Petitioner
1000-10 Candler Building
Atlanta, Georgia 30303

SUPREME COURT OF THE UNITED STATES

October term, 1970

No. 1 2 5 1

SOUTHLAND INCORPORATED
Petitioner in Certiorari

v.

COX ENTERPRISES INC AND ATLANTA NEWSPAPERS INC.
Respondents in Certiorari

PETITION FOR REHEARING OF SOUTHLAND INCORPORATED IN ITS PETITION FOR CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner Southland Incorporated seeks a rehearing because obviously some of its pleadings in the case, namely its Reply Brief, and the Record, failed to reach the Court in time for consideration before the Court's denial of writ of certiorari March 28, 1971.

PETITIONER IS CONFIDENT THAT IF THESE DOCUMENTS ARE GIVEN CAREFUL SCRUTINY THIS HONORABLE COURT WILL BE CONVINCED THAT ANY POSSIBLE REASONS FOR DENYING THE WRIT HAVE BEEN ELIMINATED.

The Reply Brief at pages 10 and 11 cites four instances in which petitioner properly and timely raised federal constitutional questions before the trial court.

The Reply Brief cites a 10-page brief on constitutional questions which was presented in the trial court by counsel for petitioner (R33,43).

On pages 14, 15 and 16 of its Reply Brief petitioner cites three additional instances in which federal constitutional questions were timely and properly raised in the trial court. In each instance controlling sections of the federal constitution were cited.

THE REPLY BRIEF POINTED OUT AT PAGE 13 THAT CONSTITUTIONAL QUESTIONS HERE PRESENTED ARE SO UNUSUAL AND OF SUCH EXTRAORDINARY PUBLIC IMPORT THAT THEY DEMAND CONSIDERATION BY THIS COURT.

If this judgment is allowed to stand, every corrupt municipal administration in the nation will be left free to close streets without regard to private or public needs or rights and barter the land to private parties for private use including private building sites as in the case at bar.

If this judgment is allowed to stand it will have other far-reaching and disastrous results to private and public constitutional rights.

THE TRIAL COURT HELD AND THE SUPREME COURT OF GEORGIA AFFIRMED THAT THE INTEREST OF PETITIONER AND OF THE PUBLIC IN THE STREETS IS AT THE MERCY OF ABUTTING LANDOWNERS WHO MAY CLOSE A STREET AND TAKE THE LAND FOR THEIR PRIVATE USE.

It is inconceivable that this Court can approve such a shocking, unjust and unconstitutional judgment.

The denial of the writ would have the effect of approving said shocking, unjust and unconstitutional judgment.

If the present judgment is allowed to

stand, any appellate court of any state can avoid deciding questions however meritorious or however pressing by the device of declaring that some other case dealing with different matters "controls" or by deciding that a later case controls a former case as held in the case at bar.

IF THIS JUDGMENT IS ALLOWED TO STAND, ANY COURT REPORTER OR JUDGE WILL HAVE IT IN HIS POWER TO CIRCUMVENT THE RIGHT TO AN APPEAL AND TO DENY A PARTY A REVIEW IN THE HIGH COURTS BY SIMPLY "MIS-PLACING" THE EVIDENCE FOR ONE YEAR.

A denial of the writ in this case would be in direct conflict with prior decisions of this court cited by petitioner in its Reply Brief.

A denial of the writ would have the effect of upholding the judgment of the Supreme Court of Georgia arbitrarily and capriciously depriving petitioner of its property consisting of its right of ingress and egress to and from its place of business without Due Process of Law and without Equal Protection of the Law granted to other persons

and parties in like circumstances and similar situations in violation of Section I of Amendment XIV of the U. S. Constitution and Amendment V of said Constitution as applied to the States by Section I of Amendment XIV thereof.

WHEREFORE petitioner prays this honorable Court will reconsider its previous denial of writ and will grant writ of certiorari in this case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ for certiorari should be allowed.

Respectfully submitted,

G. Seals Aiken
Attorney for Petitioner
1409-10 Candler Building
Atlanta, Ga. 30303

CERTIFICATE OF SERVICE

The undersigned attorney for Petitioner hereby certifies that at least three copies of the foregoing Petition for Rehearing of Southland Incorporated have

been served upon Counsel of Record for all the Respondents by depositing the same in a United States mail box, with first class postage prepaid, respectively addressed to such Counsel of Record at their post office addresses, as follows:

Allen Post, Esq.
3300 First National Bank Tower
Atlanta, Georgia 30303
Counsel for Atlanta Newspapers
and Cox Enterprises Inc., Respondents

Henry L. Bowden and
Martin McFarland Esqs.
William-Oliver Building
Atlanta, Georgia 30303
Attorneys for Respondent City of Atlanta

J. L. Glover Esq.
Glover and Davis
Post Office Drawer 1038
Newnan, Georgia 30263
Attorney for Respondent Batson-Cook Co.

This _____ day of April, 1971

G. Seals Aiken
Counsel for Petitioner
Southland Incorporated